No. 12491

United States
Court of Appeals
for the Ninth Circuit.

PICKERING LUMBER CORPORATION, a corporation,

Appellant,

vs.

THE AMERICAN INSURANCE COMPANY, et al.,

Appellees.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 288)

Appeal from the United States District Court, Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

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In the District Court of the United States for the Northern District of California, Southern Division

No. 27299 H

THE AMERICAN INSURANCE COMPANY; ATLAS ASSURANCE COMPANY LIMITED; CALEDONIAN INSURANCE COMPANY; THE CAMDEN FIRE INSURANCE ASSOCIATION; COLUMBIA INSURANCE COMPANY OF NEW YORK; COMMERCIAL UNION ASSURANCE COMPANY, LIMITED; THE CONTINENTAL INSURANCE COMPANY; FIRE ASSOCIATION OF PHILADELPHIA; FIREMAN'S FUND INSURANCE COMPANY; FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY; GLENS FALLS INSURANCE COMPANY; GLOBE AND RUTGERS FIRE INSURANCE COMPANY; GREAT AMERICAN INSURANCE COMPANY; THE HANOVER FIRE INSURANCE COMPANY; HARTFORD FIRE INSURANCE COMPANY; THE HOME INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; NATIONAL FIRE INSURANCE COMPANY OF HARTFORD; NATIONAL LIBERTY INSURANCE COMPANY OF AMERICA; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, PA.; NEW HAMPSHIRE FIRE INSURANCE COMPANY; NEW YORK

UNDERWRITERS INSURANCE COMPANY; NEW ZEALAND INSURANCE COMPANY, LIMITED; THE NORTHERN ASSURANCE COMPANY LIMITED; NORWICH UNION FIRE INSURANCE SOCIETY LIMITED; PEARL ASSURANCE COMPANY, LIMITED; THE PENNSYLVANIA FIRE INSURANCE COMPANY; QUEEN INSURANCE COMPANY OF AMERICA; ST. PAUL FIRE & MARINE INSURANCE COMPANY; SCOTTISH UNION AND NATIONAL INSURANCE COMPANY; SECURITY INSURANCE COMPANY, OF NEW HAVEN; SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY; THE TRAVELERS FIRE INSURANCE COMPANY; UNITED STATES FIRE INSURANCE COMPANY; WESTCHESTER FIRE INSURANCE COMPANY; THE WESTERN ASSURANCE COMPANY; all corporations,

Plaintiffs,

vs.

PICKERING LUMBER CORPORATION, a corporation,

Defendant.

COMPLAINT FOR DECLARATORY RELIEF

Plaintiffs allege:

I.

The jurisdiction of this Court arises out of the fact that the parties are citizens of different states,

and the amount in controversy is in excess of $3000.00 exclusive of interest and costs; this is a suit brought pursuant to the Federal Declaratory Judgment Act (28 USC 400), in a case of actual controversy between plaintiffs and defendant; all as more fully hereinafter appears.

II.

Each of the plaintiffs is a corporation incorporated under the laws of a state of the United States other than the State of Delaware, or under the laws of a foreign country, as follows:

Name of Plaintiff and Where Incorporated: The American Insurance Company, New Jersey; Atlas Assurance Company Limited, Great Britain; Caledonian Insurance Company, Great Britain; The Camden Fire Insurance Association, New Jersey; Columbia Insurance Company of New York, New York; Commercial Union Assurance Company, Limited, Great Britain; The Continental Insurance Company, New York; Fire Association of Philadelphia, Pennsylvania; Fireman's Fund Insurance Company, California; Firemen's Insurance Company of Newark, New Jersey, New Jersey; Glens Falls Insurance Company, New York; Globe and Rutgers Fire Insurance Company, New York; Great American Insurance Company, New York; The Hanover Fire Insurance Company, New York; Hartford Fire Insurance Company, Connecticut; The Home Insurance Company; New York; Insurance Company of North America, Pennsylvania;

National Fire Insurance Company of Hartford, Connecticut; National Liberty Insurance Company of America, New York; National Union Fire Insurance Company of Pittsburg, Pa., Pennsylvania; New Hampshire Fire Insurance Company, New Hampshire; New York Underwriters Insurance Company, New York; New Zealand Insurance Company, Limited, New Zealand; The Northern Assurance Company, Limited, Great Britain; Norwich Union Fire Insurance Society Limited, Great Britain; Pearl Assurance Company, Limited, Great Britain; The Pennsylvania Fire Insurance Company, Pennsylvania; Queen Insurance Company of America, New York; St. Paul Fire & Marine Insurance Company, Minnesota; Scottish Union and National Insurance Company, Great Britain; Security Insurance Company, of New Haven, Connecticut; Springfield Fire and Marine Insurance Company, Massachusetts; The Travelers Fire Insurance Company, Connecticut; United States Fire Insurance Company, New York; Westchester Fire Insurance Company, New York; The Western Assurance Company, Canada.

Each of the plaintiffs is now and for many years past continuously has been engaged in business as an insurance underwriter in and by authority of the several states of the United States, including the State of California; the principal office of each of the plaintiffs in the State of California is located at San Francisco, California; and in the case of plaintiff Fireman's Fund Insurance Company, a

California corporation as aforesaid, the principal office of said plaintiff is located at San Francisco, California.

III.

Defendant is a corporation incorporated under the laws of the State of Delaware. Defendant is now and for many years past continuously has been engaged in business in the State of California, carrying on sawmill, box factory, and timber operations in said State of California. Defendant has heretofore designated a resident of the State of California as agent for service of legal process; and plaintiffs are informed and believe and therefore allege that several of its principal corporate and managing officers are and for some time have been residents of the State of California.

IV.

On or about 30 April 1945 each of the plaintiffs did, in California, issue and deliver to defendant its policy (or policies) of insurance known as use and occupancy or business interruption insurance, insuring defendant against actual loss sustained by reason of suspension of business resulting from damage by fire to certain properties of defendant located in the State of California, for a term of one year from and after 30 April 1945, and upon the provisions of and subject to the terms and conditions contained in said policies of insurance. A copy of the policy of insurance so issued by plaintiff The Home Insurance Company is attached hereto, marked Exhibit "A" and Exhibit

"B", and made a part hereof; each of the policies issued by plaintiffs is substantially identical in form and substance to the policy issued by plaintiff The Home Insurance Company, copy of which is attached hereto as aforesaid. The identifying number of and the amount of insurance provided for (as of 7 July 1945) in each of the policies so issued by plaintiffs is as follows:

Name of Plaintiff and Number of Policy	Amount
The American Insurance Company (027885)	$ 5,000
Atlas Assurance Company Limited (S–705012)	20,000
Caledonian Insurance Company (134336)	38,750
The Camden Fire Insurance Association (834784)	17,500
Columbia Insurance Company of New York (400443)	8,000
Commercial Union Assurance Company, Limited (923047)	25,000
The Continental Insurance Company (645621)	25,000
Fire Association of Philadelphia (PF–63798)	10,000
Fireman's Fund Insurance Company (A–34562)	17,000
Firemen's Insurance Company of Newark, New Jersey (29455)	15,000
Glens Falls Insurance Company (PCF–448625)	40,000
Globe and Rutgers Fire Insurance Company (38917)	5,000
Great American Insurance Company (56134)	20,250
The Hanover Fire Insurance Company (148251)	10,000
Hartford Fire Insurance Company (198018)	10,000
The Home Insurance Company (16517)	15,000
Insurance Company of North America (338100)	7,500
(Same) (OU–457353)	15,000
National Fire Insurance Company of Hartford (238990)	32,625
National Liberty Insurance Company of America (347379)	16,800
National Union Fire Insurance Company of Pittsburg, Pa. (118314)	15,000
New Hampshire Fire Insurance Company (41378)	30,000
New York Underwriters Insurance Company (137856)	20,000
New Zealand Insurance Company, Limited (133093)	25,000
The Northern Assurance Company Limited (U–111058)	32,125
Norwich Union Fire Insurance Society Limited (93876)	12,500
Pearl Assurance Company, Limited (655548)	10,000
The Pennsylvania Fire Insurance Company (249446)	15,000
Queen Insurance Company of America (Q–86515)	32,750

St. Paul Fire & Marine Insurance Company (149178)	5,000
Scottish Union and National Insurance Company (F–62436)	5,000
Security Insurance Company, of New Haven (112553)	25,000
Springfield Fire and Marine Insurance Company (283551)	10,000
The Travelers Fire Insurance Company (205026)	17,500
United States Fire Insurance Company (CL–52793)	20,200
Westchester Fire Insurance Company (544918)	15,000
The Western Assurance Company (CL–3679)	7,500

The total amount of insurance provided for (as of 7 July 1945) in and by all of the said policies in the aggregate is the sum of $651,000. Plaintiffs are informed and believe and therefore allege that at the time of the fire hereinafter referred to defendant carried no use and occupancy or business interruption insurance other than or in addition to the said policies issued by plaintiffs.

V.

On 7 July 1945 a fire damaged the properties referred to in said policies, and caused a suspension of business by and a loss to defendant.

VI.

On or about 22 March 1946, at the request of defendant, plaintiffs and each of them made an advance payment to defendant on account of said fire and loss, pending ascertainment of the amount of said loss. Said advance payment was in the aggregate amount of $250,000, and the amount paid by each plaintiff to defendant is as shown in Column (C) of Exhibit "C" attached hereto and made a part hereof.

VII.

From time to time following the said fire, at the request of defendant, plaintiffs extended the time for filing proofs of loss under the said policies of insurance; within the time as so extended and on or about 24 January 1947 defendant made and delivered to plaintiffs its proof of loss in the form of a document entitled "Final Proof of Loss" directed to each and all of plaintiffs. In said document defendant made claim against plaintiffs for an alleged loss in the total amount of $742,004.41; and defendant therein demanded payment from each plaintiff of an amount equal to the face amount of its respective policy (or policies) as shown in Column (A) of Exhibit "C" attached hereto, and made a part hereof, plus interest, less the amount of the advance payment made to defendant by each plaintiff as alleged in paragraph VI hereinabove and as shown in Column (C) of said Exhibit "C". The amount so demanded by defendant from each plaintiff, even after deduction of the advance payment made by each, and exclusive of interest and costs, was and is in excess of the sum of $3000.00 as to each plaintiff.

VIII.

On or about 27 January 1947, and within the time provided by said policies of insurance, plaintiffs notified defendant in writing that the said proof of loss was defective in the particulars specified in the notice, and requested that the defects be remedied by verified amendments. On or about 6

February 1947 defendant made and delivered to plaintiffs its reply to the said notice in the form of a document entitled "Reply Affidavit".

IX.

On or about 10 February 1947, and within the time provided by said policies of insurance, plaintiffs notified defendant in writing of their total disagreement with the amount of loss claimed by defendant, and of the amount of loss plaintiffs admitted on each of the different articles or properties set forth in the said proof of loss and in the said "Reply Affidavit", all in accordance with the provisions of the said policies of insurance.

X.

Plaintiffs and defendant failed to agree within ten days after the notice of disagreement referred to in paragraph IX hereinabove, as to the value of the subject of insurance and the amount of loss. On or about 21 February 1947, and within the time provided by said policies of insurance, plaintiffs demanded in writing an appraisement, and named a competent and disinterested appraiser. Defendant thereupon appointed a competent and disinterested appraiser. The two appraisers so chosen, before commencing the appraisement, selected a competent and disinterested umpire.

XI.

Thereafter the appraisers and umpire entered upon the said appraisement pursuant to the pro-

visions of said policies of insurance. On or about 18 April 1947 the appraisers requested plaintiffs and defendant to extend until 3 May 1947 the time for completion of the appraisement, and plaintiffs and defendant consented in writing to such extension of time. By written award dated 1 May 1947, duly signed and verified by the two appraisers and by the umpire, the values and loss were estimated, ascertained, and appraised, and the sound value and damage were separately stated, all in accordance with the provisions of the said policies of insurance, as follows:

(1) The net profits prevented and fixed charges and continuing expenses during the period from 8 July 1945 to 7 April 1946, reduced by profits realized and fixed charges and continuing expenses recovered by partial operation following the fire, were fixed at the amount of $581,000;

(2) The net profits prevented and charges and expenses which would normally have been earned during the period of twelve months immediately following the fire were fixed at the amount of $1,030,000.

(3) The expenses incurred by defendant, other than those constituting costs of partial operations, for the purpose of reducing the loss, were fixed at the amount of $1,760.

XII.

By application of the provisions of the said policies of insurance to the said ascertainment by

appraisal award the aggregate amount payable to defendant by plaintiffs pursuant to the provisions of the said policies of insurance is the sum of $491,379.41; and the amount payable by each plaintiff under and by virtue of said ascertainment and said provisions is that proportion of $491,379.41 which the face amount of each of the said policies bears to the aggregate face amount of all of said policies, as shown in Column (B) of Exhibit "C" attached hereto and made a part hereof. Between on or about 26 May 1947 and 28 May 1947, and within the time provided by said policies of insurance, each plaintiff tendered to defendant the full amount payable by it respectively, as aforesaid, less the amount of the advance payment theretofore made by each plaintiff as aforesaid; said amounts so tendered by each plaintiff are as shown in Column (D) of Exhibit "C" attached hereto and made a part hereof.

XIII.

Between on or about 29 May 1947 and 31 May 1947 defendant rejected, refused, and returned each and every such tender made by plaintiffs as aforesaid. Defendant has asserted and continues to assert to plaintiffs that defendant will not concede or accept the validity of the said appraisal award and that it intends to "dispute" such validity; and defendant further claims to be entitled to receive from each plaintiff individually and from all plaintiffs in the aggregate an amount or amounts substantially in excess of the amounts so tendered as aforesaid.

Plaintiffs are not aware of the exact amount or amounts now claimed by defendant, but are informed and believe and therefore allege that the amount or amounts now claimed are not less than the claim made by defendant in its said proof of loss, as alleged in paragraph VII hereinabove, namely, as to each plaintiff an amount equal to the face amount of its respective policy (or policies), plus interest, less the amount of the said advance payments.

XIV.

The amounts heretofore paid and tendered by plaintiffs as hereinabove alleged were and are, as to each plaintiff individually and as to all plaintiffs in the aggregate, the full amounts to which defendant was and is entitled under and by virtue of the said policies of insurance. The appraisal award, by virtue of which the said amounts were determined as aforesaid, was and is valid and binding on both plaintiffs and defendant.

XV.

In the alternative, and in event the Court should decree that the said appraisal award is invalid, then plaintiffs are entitled to have this Court determine and fix the amount of loss and damage suffered by defendant by reason of said fire and the proportionate liability of each plaintiff to defendant under and by virtue of the said policies of insurance and all the provisions thereof. And in such event, plaintiffs allege that said appraisal award was

and is liberal in the amounts thereby determined, and that the loss and damage suffered by defendant as a result of said fire within the contemplation and coverage of said policies of insurance was and is in fact substantially less than the amounts fixed in and determined by the said appraisal award.

XVI.

Plaintiffs further allege that defendant is threatening to and will, unless restrained, institute separate actions upon each of said policies of insurance, which would necessitate the defense by plaintiffs of a multitude of suits and the danger of having the amount of loss and liability established in varying amounts in the different actions instituted by defendant; plaintiffs have no clear and adequate remedy at law, and there is no clear and adequate remedy at law, which will properly protect the rights of plaintiffs in the premises. Plaintiffs therefore allege that this Court should upon hearing enjoin and restrain defendant from instituting or prosecuting any action in any other court upon the various policies of insurance involved herein, and require defendant to set up its claim under each and all of the said policies in this action; and upon a final hearing in this cause a permanent injunction should be granted.

Wherefore, plaintiffs demand that the Court adjudge:

(1) That the said appraisal award is valid and binding upon the parties hereto, and that the amount

payable by each plaintiff to defendant is the amount heretofore tendered by each plaintiff as alleged in this complaint and as shown in Column (D) of Exhibit "C" attached hereto;

(2) That should the Court decree otherwise than as prayed in the preceding paragraph hereof, the Court determine the amount to which defendant is entitled from each plaintiff under and by virtue of the provisions of the said policies of insurance referred to in this complaint;

(3) That plaintiffs recover their cost of suit herein;

(4) That plaintiffs have such other and further relief as the Court may deem proper.

BERT W. LEVIT,
LONG & LEVIT,
By /s/ BERT W. LEVIT,
Attorneys for Plaintiffs.

State of California,
City and County of San Francisco—ss.

R. H. Griffith, being first duly sworn, deposes and says: that he is an officer, to wit, Vice-President of Glens Falls Insurance Company, a corporation, one of the plaintiffs named in the foregoing complaint, and as such makes this verification for and on behalf of said corporation; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on informa-

tion or belief, and as to those matters he believes it to be true; that he makes this verification on behalf of all plaintiffs named in the foregoing complaint.

/s/ R. H. GRIFFITH.

Subscribed and sworn to before me this 13th day of June 1947.

[Seal] By /s/ KATHRYN E. STONE,
Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT A

California Standard Form Fire Insurance Policy
No Other Insurance Permitted Except by Agreement Endorsed Hereon or Added Hereto
Stock Company

No. 16517
Renewal of No. 15222

Amount $15,000.00
Rate @ 3.298. Prem. $494.70

The Home Insurance Company [Seal]
of New York
Organized 1853.

In Consideration of the Stipulations herein named and of four hundred ninety four and 70/100 dollars premium, does insure Pickering Lumber

Exhibit A—(Continued)

Corporation, as now or may hereafter be constituted, for account of whom it may concern, for the term of One Year from the Thirtieth day of April, 1945, at noon, to the Thirtieth day of April, 1946, at noon, against all loss or damage by fire, except as hereinafter provided, to an amount not exceeding Fifteen Thousand and 00/100 Dollars to the following described property while located and contained as described herein, and not elsewhere, to wit: As per slip hereto attached:

(Note: For copy of "slip hereto attached," see Exhibit "B.")

The company will not be liable beyond the actual cash value of the interest of the insured in the property at the time of loss or damage nor exceeding what it would then cost the insured to repair or replace the same with material of like kind and quality; said cash value to be estimated without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating repair or construction of buildings, and without compensation for loss resulting from interruption of business or manufacture.

This policy is made and accepted subject to the foregoing stipulations and conditions and those hereinafter stated, which are hereby specially referred to, and made part of this policy, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto,

Exhibit A—(Continued)

and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except by writing endorsed hereon or added hereto, and no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy shall not be valid until countersigned by the duly authorized agent of the company, at

In Witness Whereof, this company has executed and attested these presents.

The Home Insurance Company, New York

/s/ H. V. SMITH,
President.

By /s/ W. BEYER,
Secretary.

Countersigned at San Francisco, California, this 30th day of April, 1945.

.....
Agent.

Stipulations and Conditions Specially Referred to

Property not covered. (a) This company shall not be liable for loss to accounts, bills, currency, evidences of debt or ownership or other documents, money, notes or securities; nor, (b) unless liability is specifically assumed hereon, for loss to bullion, casts, curiosities, drawings, dies, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, business or store or office furniture or

Exhibit A—(Continued)

fixtures, sculptures, frescoes, decorations, or property held on storage or for repair.

Hazards not covered. This company will not be liable for loss by (a) theft; or (b) by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire; or (c) (unless fire ensues, and in that event for the damage by fire only) by explosion of any kind or lightning; or (d) by invasion, insurrection, riot, or civil war, or commotion, or (except as hereinafter provided) by military or usurped power, or order of any civil authority, but the company will be liable (unless otherwise provided by endorsement hereon or added hereto) if the property is lost or damaged, by fire or otherwise, by civil authority or military or usurped power exercised to prevent the spread of fire not originating from a cause excepted hereunder and which fire otherwise probably would have caused the loss of or damage to the insured property.

Matters avoiding policy. This entire policy shall be void, (a) if the insured has concealed or misrepresented any material fact or circumstances concerning this insurance or the subject thereof; or, (b) in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Unless otherwise provided by agreement endorsed hereon or added hereto, this entire policy shall be

Exhibit A—(Continued)

void, (a) if the insured now has or shall procure any other insurance, whether valid or not, on property covered in whole or in part by this policy, or (b) if the interest of the insured be other than unconditional and sole ownership, or (c) if the subject of insurance be a building on ground not owned by the insured in fee simple, or (d) if with the knowledge of the insured foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed, or (e) if this policy be assigned before a loss.

Matters suspending insurance. Unless otherwise provided by agreement endorsed hereon or added hereto this company shall not be liable for loss or damage occurring (a) while the hazard be materially increased by any means within the control of the insured; or (b) if the subject of insurance be a manufacturing establishment, while it is operated in whole or in part at night later than ten o'clock or while it ceases to be operated beyond the period of ten consecutive days; or (c) while mechanics or artisans are employed in building or altering or repairing the described premises for more than fifteen days at any one time; or (d) while illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or (e) while there be kept, used or allowed on the described premises (any usage or custom of trade or manufacture to the contrary notwithstanding) cal-

Exhibit A—(Continued)

cium carbide, phosphorus, dynamite, nitroglycerine, fireworks or other explosives; or exceeding one quart each of benzine, gasoline, naphtha or ether; or more than twenty-five pounds of gunpowder; or (f) while a building herein described whether intended for occupation by owner or tenant is vacant or unoccupied beyond the period of ten (10) consecutive days; (g) while the interest in, title to or possession of the subject of insurance is changed excepting:—(1) by the death of the insured; (2) a change of occupancy of building without material increase of hazard; and (3) transfer by one or more several copartners or coowners to the others.

Such suspension shall not extend the term of this policy nor create any right for refund of the whole or any portion of premium, nor affect the respective rights of cancellation.

Chattel mortgage. Unless otherwise provided by agreement in writing endorsed hereon or added hereto this company shall not be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage, but the liability of the company upon other property hereby insured shall not be affected by such chattel mortgage.

Fallen building clause. Unless otherwise provided by agreement endorsed hereon or added hereto, if a building or any material part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

Exhibit A—(Continued)

Removal when endangered by fire. Should any of said property be necessarily removed because of danger from fire, and there is no other insurance thereon, that part of this policy in excess of the value of the insured property remaining in the original location, or, if there is other insurance thereon, that part of this policy in excess of its proportion of the value of the insured property remaining in the original location, shall, for the ensuing five days only, cover said removed property in its new location or locations.

Cancellation. This policy shall be cancelled at any time at the request of the insured, in which case the company shall, upon surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time, without tender of unearned portion of premium, by the company by giving five (5) days' written notice of cancellation to the insured and to any mortgagee or other party to whom, with the written consent of the company, this policy is made payable, in which case the company shall, upon surrender of the policy or relinquishment of liability thereunder, refund the excess of paid premium above the pro rata premium for the expired time.

Duty of insured in case of loss. When a loss occurs the insured must give to this company written notice thereof without unnecessary delay; and shall protect the property from further damage;

Exhibit A—(Continued)

forthwith separate the damaged and undamaged personal property and put it in the best possible order; and without unnecessary delay make a complete inventory stating as far as possible the quantity and cost of each article, and the amount claimed thereon.

Within sixty days after the commencement of the fire the insured shall render to the company at its main office in California named herein preliminary proof of loss consisting of a written statement signed and sworn to by him setting forth:—(a) his knowledge and belief as to the origin of the fire; (b) the interest of the insured and of all others in the property; (c) the cash value of the different articles or properties and the amount of loss thereon; (d) all incumbrances thereon; (e) all other insurance, whether valid or not, covering any of said articles or properties; (f) a copy of the description and schedules in all other policies unless similar to this policy, and in that event, a statement as to the amounts for which the different articles or properties are insured in each of the other policies; (g) any changes of title, use, occupation, location or possession of said property since the issuance of this policy; (h) by whom and for what purpose any building herein described, and the several parts thereof, were occupied at the time of the fire.

If the company claims that the preliminary proof of loss is defective and within five days after the

Exhibit A—(Continued)

receipt thereof (without admitting the amount of loss or any part thereof) notifies in writing the insured, or the party making such proof of loss, of the alleged defects (specifically stating them) and requests that they be remedied by verified amendments the insured or such party within ten days after receipt of such notification and request must comply therewith or, if unable so to do, present to the company an affidavit to that effect.

The insured shall also furnish, if required, as far as it is practicable to obtain the same, verified plans and specifications of any buildings, fixtures or machinery destroyed or damaged; and the insured shall exhibit to any person designated in writing by this company all that remains of any property herein described and shall submit to examination under oath, as often as required, by any such person, and subscribe to the testimony so given and shall produce to such person for examination all books of account, bills, invoices and other vouchers, and permit extracts and copies thereof to be made, and in case the originals are lost certified copies, if obtainable, shall be produced.

Ascertainment of amount of loss. This company shall be deemed to have assented to the amount of loss claimed by the insured in his preliminary proof of loss, unless within twenty days after the receipt thereof, or, if verified amendments have been requested, within twenty days after their receipt, or within twenty days after the receipt of

Exhibit A—(Continued)

an affidavit that the insured is unable to furnish such amendments, the company shall notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him and shall also notify him in writing of the amount of loss, if any, the company admits on each of the different articles or properties set forth in the preliminary proof or amendments thereto.

If the insured and this company fail to agree, in whole or in part, as to the amount of loss within ten days after such notification, this company shall forthwith demand in writing an appraisement of the loss or part of loss as to which there is a disagreement and shall name a competent and disinterested appraiser, and the insured within five days after receipt of such demand and name, shall appoint a competent and disinterested appraiser and notify the company thereof in writing, and the two so chosen shall before commencing the appraisement, select a competent and disinterested umpire.

The appraisers together shall estimate and appraise the loss or part of loss as to which there is a disagreement, stating separately the sound value and damage, and if they fail to agree they shall submit their differences to the umpire, and the award in writing duly verified of any two shall determine the amount or amounts of such loss.

The parties to the appraisement shall pay the appraisers respectively appointed by them and shall

Exhibit A—(Continued)

bear equally the expense of the appraisement and the charges of the umpire.

If for any reason not attributable to the insured, or to the appraiser appointed by him, an appraisement is not had and completed within ninety days after said preliminary proof of loss is received by this company, the insured is not to be prejudiced by the failure to make an appraisement, and may prove the amount of his loss in an action brought without such appraisement.

Options of company in case of loss. This company may, at its option, take all or any part of the property for which insurance hereunder is claimed at its ascertained or appraised value, and may also, at its option, in satisfaction of its liability hereunder, repair, rebuild or replace any building or structure or machine or machinery used therein, with other of like kind and quality, within a reasonable time, upon giving notice within twenty days of its intention so to do after receipt by it of the preliminary proof of loss, or, if verified amendments have been requested, within twenty days after their receipt, or, within twenty days after the receipt of an affidavit that the insured is unable to furnish such amendments.

There can be no abandonment to this company of any property.

Apportionment of loss. This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for

Exhibit A—(Continued)

loss by, and expenses of, removal from the premises endangered by fire, than the amount hereby insured bears to the entire insurance covering such property whether valid or not, or by solvent or insolvent insurers.

Loss when payable. A loss hereunder shall be payable in thirty days after the amount thereof has been ascertained either by agreement or by appraisment; but if such ascertainment is not had or made within sixty days after the receipt by the company of the preliminary proof of loss, then the loss shall be payable in ninety days after such receipt.

Non-waiver by appraisal or examination. This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof, by assenting to the amount of the loss or damage or by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for.

Subrogation. If this company shall claim that the fire was caused by the act or neglect of any person or corporation, this company shall, on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

Time for commencement of action. No suit or action on this policy for the recovery of any claim

Exhibit A—(Continued)

shall be sustained, until after full compliance by the insured with all of the foregoing requirements, nor unless begun within fifteen months next after the commencement of the fire.

Definitions. Wherever in this policy the word "insured" occurs, it shall be held to include the legal representatives of the insured in case of his death, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage," and wherever the words "the time of loss or damage" are used they shall be deemed the equivalent of "the time of the commencement of the fire."

Assignment of Interest by Insured

The interest of..... as owner of the property covered by this Policy is hereby assigned to..... subject to the consent of The Home Insurance Company, New York.

Dated.....19....

.....

(Signature of Insured)

Consent by Company to Assignment of Interest

The Home Insurance Company, New York, hereby consents that the interest of..... .....as owner of the property covered by this Policy be assigned to.....

Dated.....19....

.....

Agent.

Exhibit A—(Continued)

Read This Policy

Ins. Co. is liable only for actual cash value.

Policy is void in case of any fraud, false swearing, misrepresentation or concealment about material facts.

Policy is void, unless otherwise agreed in writing, if

1st. It is assigned before loss;

2nd. Insured has or shall procure other insurance;

3rd. Any change occurs in location of property;

4th. Insured building is on ground not owned in fee simple by insured;

5th. Insured is not sole and unconditional owner.

Policy is suspended, unless otherwise agreed in writing, if

6th. Described building becomes vacant or unoccupied for 10 days;

7th. Mechanics are employed more than 15 days in repairing same;

8th. Property is or becomes encumbered by chattel mortgage;

9th. Illuminating gas or vapor is generated in or adjacent to described building;

10th. Explosives or prohibited quantities of gasoline, etc., are kept on premises.

Exhibit A—(Continued)

Insurance ceases if described building or any material part falls except as result of fire.

Policy does not cover certain enumerated personal property.

Note particularly duty of insured in case of loss;

Also provisions avoiding or suspending policy, including changes of ownership or possession.

It is important that the written portions of all policies covering the same property read exactly alike. If they do not they should be made uniform at once.

EXHIBIT B

"Business Interruption—Fire"

This Policy Insures
Pickering Lumber Corporation
As now or may hereafter be constituted.
For account of whom it may concern.

1. "Loss Payable Conditions"—Loss, if any, to be adjusted with and payable to Pickering Lumber Corporation.

2. "Coverage"—

Amount: $

2(A). The conditions of this contract are that if the buildings and/or structures and/or machinery and/or equipment and/or supplies and/or all that property upon which the printed conditions of this policy require that liability be specifically assumed

Exhibit B—(Continued)

and/or raw stock (all as now or hereafter existing); in, on and/or under "Plantsite," "Athletic Field" and "Townsite" premises situate at and near Standard, Tuolumne County, California, and occupied or used for woodworking or mercantile, or for any other purposes, including (but not limited to) townsite purposes or purposes incidental or related to such woodworking or mercantile operations, be destroyed or damaged by fire occurring during the term of this policy so as to necessitate a total or partial suspension of business, this Company shall be liable under this policy for the actual loss sustained by reason of such suspension, consisting of:

Item I. The net profits on the business which is thereby prevented;

Item II. Fixed charges and expenses, only to the extent to which they would have been earned had no fire occurred, as follows: Salaries of indispensable employees, superintendents, executives, salesmen and of employees under contract, taxes, interest, rents, royalties, insurance premiums, depreciation, advertising, special contracts, dues, subscriptions, directors' fees, accounting expenses, legal expenses and fees, light, heat and power, and such other fixed charges and expenses which must necessarily continue during a total or partial suspension of business.

2(B). It Is Understood and Agreed That This Insurance Is Extended (Subject to All Its Other

Exhibit B—(Continued)

Terms, Conditions and Stipulations) to Cover Actual Loss Sustained, as Otherwise Defined, Resulting from Damage to or Destruction by the Perils Insured Against of Any Bridges and/or Trestles Used in Connection With the Insured's Logging Operations in Tuolumne County and Adjoining Counties.

The Provisions Printed on the Back of This Form or on Other Pages Attached Hereto Are Hereby Referred to and Made a Part Hereof.

This form is attached to and made a part of Policy No. 16517 of the Home Insurance Company.

Date: April 30, 1945.

/s/ .....
Agent.

Cosgrove & Company, Inc.
Insurance Brokers—Average Adjusters

2(C). It is understood and agreed that any income derived from or expenses incurred in the store and townsite operations of the insured at Standard, Tuolumne County are not covered hereunder and such income and expenses shall not be considered in the application of the average clause made a part hereof.

3. It is a condition of this contract that the length of time of suspension for which loss may be claimed:

Exhibit B—(Continued)

(A) Shall not exceed seventy-five per cent (75%) of 365 calendar days;

(B) Shall not exceed such length of time as would be required with due diligence and dispatch to rebuild, repair or replace such property herein described as may have been destroyed or damaged;

(C) Shall commence with the date of the fire and not be limited by the date of expiration of this policy.

4. "Contribution Clause"—It is expressly stipulated and made a condition of this contract that, in the event of loss, this company shall be liable for no greater proportion thereof than the amount hereby insured bears to seventy-five per cent (75%) of the total of the net profits (Item I) and charges and expenses (as specified in Item II) which would normally have been earned during the period of twelve (12) months immediately following the fire.

5. This company shall not be liable under this policy as to net profits for more than the net profits prevented by the total or partial suspension of business nor for charges and expenses in excess of those which must necessarily continue during a total or partial suspension of business, and then only to the extent to which such charges and expenses would have been earned had no fire occurred; nevertheless this company shall be liable for such expenses as may be incurred for the purpose of reducing any

Exhibit B—(Continued)

loss under this policy, not exceeding, however, the amount in which the loss is so reduced.

6. In determining the amount of net profits and charges and expenses that would have been earned had no fire occurred, whether for the purpose of ascertaining the amount of loss sustained or in the application of the contribution clause, due consideration shall be given to the experience of the business before the fire and the probable experience thereafter.

7. The term "raw stock" wherever used in this contract shall be construed to mean materials and supplies usual to the insured's business in the state in which the insured receives them or which have undergone any aging, seasoning, mechanical or other process of manufacture but which have not become "finished stock."

The term "finished stock" wherever used in this contract shall be construed to mean any stock which in the ordinary course of the insured's business is ready for packing, shipment or sale.

8. The word "day," however modified, wherever used in this contract, shall be held to cover a period of twenty-four hours.

9. It is a condition of this insurance that the insured shall not be entitled to compensation on account of loss which may be occasioned by any ordinance or law regulating or prohibiting construction or repair of buildings, or by the suspen-

Exhibit B—(Continued)

sion, lapse or cancellation of any license or lease, or for any other remote loss.

10. It is a condition of this insurance that as soon as practicable after any loss, the insured shall resume complete or partial operation of the property herein described, and shall make use of other property, if obtainable, if by so doing the amount of loss hereunder will be reduced, and in the event of the loss being so reduced such reduction shall be taken into account in arriving at the amount of the loss hereunder.

11. It is a condition of this insurance that surplus machinery or duplicate parts thereof, equipment or supplies, and (if this policy covers liability for suspension of business due to damage to or destruction of raw stock) surplus or reserve raw stock, which may be owned, controlled or used by the insured, shall in the event of loss, be used in placing the property in condition for continuing or resuming business.

12. It is a condition of this insurance

(A) That this company shall in no event be liable for loss resulting from damage to or destruction of finished stock or for the time required to reproduce any finished stock which may be damaged or destroyed;

(B) That if liability for suspension of business due to damage to or destruction of raw stock is

Exhibit B—(Continued)

specifically assumed hereunder, such liability shall be limited to that period of time for which the damaged or destroyed raw stock would have made operations possible, but in no event to exceed the time limit specified in paragraph No. 3 of this form.

13. It is a condition of this insurance, if this policy covers liability for suspension of business due to damage to or destruction of building(s), machinery and equipment only, that this company shall not be liable for any loss due to damage to or destruction of any stock, whether raw or finished.

14. It is a condition of this insurance that in case the insured and this company are unable to agree as to the time necessary to rebuild, repair or replace the described property, and/or the value of the subject of this insurance, and/or the amount of loss thereon, the same shall be determined by appraisal in the manner provided by this policy, the provisions of which policy shall govern in all matters pertaining to this insurance except as herein otherwise provided.

15. The liability hereunder shall not exceed the amount of insurance by this policy, nor a greater proportion of any loss than the insurance hereunder shall bear to all insurance, whether valid or not, and whether collectible or not, covering in any manner the loss insured against by this policy.

16. "Interruption by Civil Authority"—Not-

Exhibit B—(Continued)

withstanding anything to the contrary herein, this Company shall be liable for actual loss sustained, as covered hereunder, during the period of time, not exceeding two weeks, while access to the premises described is prohibited by order of civil authority, but only when such order is given as a direct result of fire in the vicinity of said premises.

17. "Lightning and Electrical Apparatus Clause"—

(a) Except as hereinafter provided, this policy shall cover Business Interruption loss resulting directly from damage to the property described as covered, caused by lightning, meaning thereby the commonly accepted use of the term "lightning," and in no case to include damage by cyclone, tornado or windstorm.

(b) This company shall not be liable for any business interruption loss resulting from any electrical injury, disturbance or damage to wiring or electrical appliances or devices of any kind whether from artificial or natural causes unless fire ensues and then only for such business interruption loss caused by such ensuing fire.

(c) Liability under the above lightning and electrical apparatus clause, shall be subject to all the conditions and limitations of this form and the policy to which it is attached, and if there is any other business interruption insurance on said property, this company shall be liable only pro rata with such other insurance, for business interrup-

Exhibit B—(Continued)

tion loss caused by lightning, whether such other insurance be against loss by lightning or not.

18. "Consequential Damage Assumption Clause." It is understood and agreed that this Company shall be liable for any Business Interruption loss due to damage to stock of merchandise and/or supplies caused by change of temperature resulting from total or partial destruction by fire, or refrigerating or cooling apparatus, connections or supply pipes.

18(A). The total liability for Business Interruption loss caused by fire and/or consequential damage, either separately or together shall in no case exceed the total amount of this policy in effect at the time of loss. If there is other Business Interruption insurance upon the property damaged, this Company shall be liable only for such proportion of any consequential loss as the amount hereby insured bears to the whole amount insured thereon whether such other said insurance contains a similar clause or not.

19. "Loss Reinstatement Clause"—It is a condition of this policy that in case of loss occurring hereunder the amount of such loss shall be automatically reinstated after its occurrence and this insurance shall then cover for the full amount provided for hereunder. In consideration of such reinstatement it is a condition of this policy that the insured shall pay this Company a pro rata addi-

Exhibit B—(Continued)

tional premium for the unexpired term of this policy on the amount of the loss paid provided such loss payment exceeds One Hundred Dollars ($100.00). In the event the insured does not require reinstatement of the amount of the loss, notice shall be given this Company without unnecessary delay and the amount of insurance under this policy shall then be reduced by the amount of the loss.

20. "Automatic Sprinkler Warranty"—Applying Only to the Box Factory and Planing Mill Group—This policy being written at a reduced rate based on the protection of a portion of the box factory and planing mill group by an automatic sprinkler system, it is a condition of this policy that, so far as the sprinkler system and the water supply therefor are under the control of the insured, due diligence shall be used by the insured to maintain them in complete working order, and that no change shall be made in the said system or in the water supply therefor without the consent in writing of this company or the Board of Fire Underwriters of the Pacific.

21. "Watchman With Approved Recording System or Watchlock Warranty"—Applying only to the plantsite premises—warranted by the insured that due diligence will at all times be used by the insured to maintain one or more watchmen (with approved recording system or watchclock) who shall keep a continuous watch in and about the within described premises during the entire night, whether

Exhibit B—(Continued)

the premises herein described be open for business or shut down or not in operation, and also during the entire day or portion thereof (including Sundays and holidays) when said premises are not open for business or are shut down or are not in operation. A breach of this warranty suspends this insurance during such breach.

22. "Clear Space Warranty"—Applying Only to Property Insured Hereunder While Contained in the Lumber Storage Yard Which Is West of the Dry Kiln and Dry Kiln Shed Group and West of the Planing Mill and Cut-Up Factory Group at Location No. 1—Warranted by the insured that a continuous clear space of two hundred (200) feet shall be maintained between the stock in the lumber storage yard and the sawmill and dry kiln group and two hundred and forty (240) feet between the stock in the lumber storage yard and the planing mill and cut-up factory group, except that a clear space of two hundred (200) feet only shall be required between the planing mill and cut-up factory group and barn building No. 106 situate southeast of the lath storage yard, and that such clear space shall not be used for handling or piling of lumber or other merchandise therein for any purpose, it being the intention of the parties that such clear space shall establish the yard limits.

22(A). It is further understood and agreed by the Insured that any violation of this "Clear Space

Exhibit B—(Continued)

Warranty" shall wholly suspend the insurance under this policy insofar as it applies to property insured hereunder when contained in the Lumber Yard during the period such violation shall continue.

22(B). Permission, however, is granted the Insured under this policy to load or unload within, and to transport lumber and/or other merchandise across such clear space, and to maintain thereon tramways upon which lumber or other merchandise shall not be piled, except that, when lumber is transported by overhead electric system, the piling of lumber for such transportation within the clear space for a period not exceeding seventy-two (72) hours shall not be considered a violation of this "Clear Space Warranty"; nor shall the location and existence of; conveyors, monorail structures; monorail station; monorail repair house; girls' lunch room; old Box Factory Boiler House Building Nos. 44 and 45; monorail bunks; supports for piping; fire fighting facilities; tracks; vehicles; rolling stock; lumber on or in cars; fences; toilets; wooden bridges; or hose and hydrant houses; be considered as a violation under this agreement.

23. "Fallen Building Clause"—Applying to All Property Except Blower Station Building and Box Factory and Planing Mill Group, Including Cut Stock and Lumber Shed Additions and Other Additions and Extensions in Contact Therewith and All

Exhibit B—(Continued)

Contents Thereof—If a building or any material part thereof, fall, except as a result of fire, all insurance by this policy shall immediately cease.

24. "Fallen Building Clause Waiver"—Applying To Blower Station Building and Box Factory and Planing Mill Group, Including Cut Stock and Lumber Shed Additions and Other Additions and Extensions in Contact Therewith and All Contents Thereof—The provisions (if any) in this policy to the effect that if the building or any part thereof fall, except as the result of fire, all insurance by this policy shall immediately cease, are hereby waived. Under this insurance against use and occupancy loss by fire and this Fallen Building Clause Waiver, this company is not liable for Business Interruption loss caused by eathquake, or by the fall of any portion of said building from cause other than fire, unless fire ensues, and then for the Business Interruption loss of fire only.

24(A). "Contribution Clause, Including Provision That Other Insurance Invalidated Under 'Fallen Building Clause' Shall Be Deemed To Be Contributing Insurance"—It is understood and agreed that this company shall not be liable under this policy for a greater proportion of any business interruption loss on the within described subject of insurance than the amount hereby insured bears to the entire fire business interruption insurance on such subject of insurance, whether valid or not, or

Exhibit B—(Continued)

by solvent or insolvent insurers; provided that such entire fire business interruption insurance shall be deemed to include also all fire business interruption insurance on the subject of insurance, which has been invalidated by the fall of the within described building, or part thereof, and which but for such fall would have been in force at the time of loss hereunder.

25. "Notification Clause"—It is understood and agreed that all notices and/or communications concerning this policy shall be addressed to the offices of the insured at Standard, Tuolumne County, California.

26. "Ownership Clause"—It is understood and agreed that one or more deeds of trust, bonded indebtedness, chattel or other mortgages may exist or be negotiated on the property insured; that foreclosure proceedings may be instituted or notice given of sale of any property covered by this policy; that the interest of the insured may be other than unconditional and sole ownership and that the buildings may be on ground not owned by the insured in fee simple; that changes may take place in the interest, title or possession of the subject of insurance whether by legal process or judgment or by voluntary act of the insured, or otherwise; all without prejudice to this insurance.

27. "Subrogation Clause"—Without prejudice to this insurance and at any time prior to a loss the

Exhibit B—(Continued)

insured may release any corporation, firm, individual or other entity from liability for loss caused by act or neglect of themselves or their employees, agents or representatives. All right of subrogation is hereby waived under this policy if it is claimed that loss was occasioned or caused by the act or neglect of any corporation, firm, individual or other entity to which or to whom coverage is afforded under this policy or of any corporation, firm, individual or other entity parent or subsidiary to, owned or controlled by or affiliated with the insured.

28. "Time Clause"—Wherever time is referred to in this policy it shall be construed to mean the "Standard Time" of the place where the property being the subject of this insurance is situated.

29. "Acts or Omissions Clause"—It is understood and agreed that this insurance shall not be prejudiced by reason of any acts or omissions on the part of sub or other tenants, when such acts or omissions are not within the control of the insured named herein.

30. "Error in Description Clause"—It is understood and agreed that any error in description or location of the within described premises shall not prejudice this insurance.

Exhibit B—(Continued)

31. "Permits Clause"—Permission is hereby granted, without limit of time but without extending the term of this policy: for existing and increased hazards; to work at all hours, day and night; to cease operations and/or shut down and/or remain vacant or unoccupied (subject to the limitations indicated below); to make such changes in the use and occupancy of the premises as may be desired; to make additions, alterations, improvements and repairs (this insurance to cover therein and/or thereon); to delete and/or reconstruct; to generate illuminating gas or vapor; and for such use of the premises as is usual and/or incidental in the business, as conducted therein, and to keep and use all articles and materials usual and/or incidental to said business, in such quantities as the exigencies of the business require; anything in the printed conditions of this policy to the contrary notwithstanding.

31(A). It is agreed, however, that if the "Plant-site" premises are shut down and/or not in operation and/or vacant or unoccupied for a period in excess of sixty (60) consecutive days at any one time during the term of this policy, written permit must be obtained from this company and endorsed hereon.

31(B). Other Insurance Permitted.

32. "War Emergency Clause"—In consideration of the rate and premium at which this policy is written, it is a condition of this insurance that not-

Exhibit B—(Continued)

withstanding any provision of the policy excluding liability for loss caused by order of any civil authority or any provision in the policy or form attached thereto excluding loss which may be occasioned by any ordinance or law regulating construction or repair, this company shall be liable, subject to all other conditions and limitations of the policy, for loss resulting from additional time (not exceeding the maximum limit of time, if any, specifically stated in this policy) required to rebuild, replace, or repair property herein described as a consequence of any law, government order or directive which regulates, prohibits or restricts construction, the acquisition of machinery, equipment, or other means required for the replacement or repair of property damaged or destroyed; but in no event shall this company be liable for any delay which may be caused, directly or indirectly, by any local law or ordinance regulating construction or repair.

32(A). This company shall not be liable for a greater proportion of any loss than the amount of insurance under this policy bears to the whole amount of insurance, whether valid or not and whether collectible or not, applying to any part of the liability assumed under this policy whether or not other insurance covers or excludes in whole or in part liability assumed by this clause.

33. "Warranty Compliance Clause"—This policy shall not be affected by failure of the insured to comply with any of the warranties or conditions en-

Exhibit B—(Continued)

dorsed on this policy in any portion of the premises over which the insured has no control.

34. "Breach of Warranty and/or Condition Clause"—If a breach of any warranty and/or condition contained in any rider attached to this policy shall occur, which breach by the terms of such warranty and/or condition, shall operate to suspend or avoid this insurance, it is agreed that such suspension or avoidance due to such breach, shall be effective only during the continuance of such breach and then only to the building and/or fire division and/or contents therein and/or other separate location to which such warranty and/or condition has reference and in respect of which such breach occurs.

35. "Unpaid Premium Clause"—Regardless of any loss payable or mortgage clause or other provision of this policy, and notwithstanding insured shall have become indebted to the company subsequent to the date hereof, on this or some other policy, the company shall deduct from the proceeds of any and all claims for loss, dividends or return premiums due the insured, or others hereunder, the amount in which insured shall be indebted to Cosgrove & Company, Inc. for insurance premiums advanced by it upon this policy and shall pay to or place to the credit of Cosgrove & Company, Inc. such deducted amount.

EXHIBIT C

Policy No.	Name of Plaintiff	(A) Amount of Policy	(B) Appraisal Award	(C) Advance Payment	(D) Amount Tendered
027885	The American Insurance Company	$ 5,000.00	$ 3,774.04	$ 1,920.12	$ 1,853.92
S–705012	Atlas Assurance Company Limited	20,000.00	15,096.14	7,680.49	7,415.65
134336	Caledonian Insurance Company	38,750.00	29,248.77	14,880.95	14,367.82
834784	The Camden Fire Insurance Association	17,500.00	13,209.12	6,720.43	6,488.69
400443	Columbia Insurance Company of New York	8,000.00	6,038.46	3,072.20	2,966.26
923047	Commercial Union Assurance Company, Limited	25,000.00	18,870.18	9,600.61	9,269.57
645621	The Continental Insurance Company	25,000.00	18,870.18	9,600.61	9,269.57
PF–63798	Fire Association of Philadelphia	10,000.00	7,548.07	3,840.25	3,707.82
A–34562	Fireman's Fund Insurance Company	17,000.00	12,831.72	6,528.42	6,303.30
29455	Firemen's Insurance Company of Newark, New Jersey	15,000.00	11,322.11	5,760.37	5,561.74
PCF–448625	Glens Falls Insurance Company	40,000.00	30,192.28	15,360.98	14,831.30
38917	Globe and Rutgers Fire Insurance Company	5,000.00	3,774.04	1,920.12	1,853.92
56134	Great American Insurance Company	20,250.00	15,284.84	7,776.50	7,508.34
148251	The Hanover Fire Insurance Company	10,000.00	7,548.07	3,840.25	3,707.82
198018	Hartford Fire Insurance Company	10,000.00	7,548.07	3,840.25	3,707.82
16517	The Home Insurance Company	15,000.00	11,322.11	5,760.37	5,561.74
338100	Insurance Company of North America	7,500.00	5,661.05	2,880.18	2,780.87
OU–457353	(Same)	15,000.00	11,322.11	5,760.37	5,561.74
238990	National Fire Insurance Company of Hartford	32,625.00	24,625.58	12,528.80	12,096.78
347379	National Liberty Insurance Company of America	16,800.00	12,680.76	6,451.61	6,229.15
118314	National Union Fire Insurance Company of Pittsburg, Pa	15,000.00	11,322.11	5,760.37	5,561.74
41378	New Hampshire Fire Insurance Company	30,000.00	22,644.21	11,520.74	11,123.47
137856	New York Underwriters Insurance Company	20,000.00	15,096.14	7,680.49	7,415.65
133093	New Zealand Insurance Company, Limited	25,000.00	18,870.18	9,600.61	9,269.57
U–111058	The Northern Assurance Company Limited	32,125.00	24,248.18	12,336.79	11,911.39
93876	Norwich Union Fire Insurance Society Limited	12,500.00	9,435.09	4,800.31	4,634.78
655548	Pearl Assurance Company, Limited	10,000.00	7,548.07	3,840.25	3,707.82
249446	The Pennsylvania Fire Insurance Company	15,000.00	11,322.11	5,760.37	5,561.74
Q–86515	Queen Insurance Company of America	32,750.00	24,719.93	12,576.81	12,143.12
149178	St. Paul Fire & Marine Insurance Company	5,000.00	3,774.03	1,920.12	1,853.91
F–62436	Scottish Union and National Insurance Company	5,000.00	3,774.03	1,920.12	1,853.91
112553	Security Insurance Company, of New Haven	25,000.00	18,870.18	9,600.61	9,269.57
283551	Springfield Fire and Marine Insurance Company	10,000.00	7,548.07	3,840.25	3,707.82
205026	The Travelers Fire Insurance Company	17,500.00	13,209.12	6,720.43	6,488.69
CL–52793	United States Fire Insurance Company	20,200.00	15,247.10	7,757.30	7,489.80
544918	Westchester Fire Insurance Company	15,000.00	11,322.11	5,760.37	5,561.74
CL–3679	The Western Assurance Company	7,500.00	5,661.05	2,880.18	2,780.87
	Totals	$651,000.00	$491,379.41	$250,000.00	$241,379.41

[Endorsed]: Filed June 13, 1947.

[Title of District Court and Cause.]

SECOND AMENDED ANSWER AND COUNTER CLAIM

Answer

The defendant admits, denies and otherwise pleads to the complaint in the above-entitled cause as follows:

I.

The allegations of paragraph I of the complaint are admitted.

II.

The allegations of paragraph II of the complaint are admitted.

III.

The allegations of paragraph III of the complaint are admitted.

IV.

The allegations of paragraph IV of the complaint are admitted.

V.

The allegations of paragraph V of the complaint are admitted.

VI.

The allegations of paragraph VI of the complaint are admitted.

VII.

The allegations of paragraph VII of the complaint are admitted.

VIII.

The allegations of paragraph VIII of the complaint are admitted.

IX.

The allegations of paragraph IX of the complaint are admitted.

X.

Defendant admits that plaintiffs and defendant failed to agree, within 10 days after the notice of disagreement referred to in paragraph IX of the complaint, as to the amount of loss, but states there was no attempt by plaintiffs or defendant to agree as to the "value of the subject of insurance." Defendant admits that on or about the 21st day of February, 1947, and within the time provided by said policies of insurance, plaintiffs demanded in writing an appraisement and appointed an appraiser and that defendant thereupon appointed an appraiser and that the two appraisers so chosen, before commencing the appraisement, selected an umpire.

XI.

The allegations of paragraph XI of the complaint are admitted except defendant denies the allegation that "the value and loss were estimated, ascertained, and approved, and the sound value

and damage were separately stated, all in accordance with the provisions of said policies of insurance."

XII.

The allegations of paragraph XII of the complaint are admitted except that defendant denies that each and every plaintiff tendered to defendant the full amount payable by it respectively and alleges in that regard that some of the plaintiff insurance companies tendered their proportionate share of the amount awarded by the appraisers and that thereafter defendant returned the amounts so tendered to said plaintiff insurance companies and at that time defendant advised the representative for the plaintiff insurance companies that defendant would not accept payments from said plaintiff insurance companies under said award and that defendant intended to dispute the validity of said award. Defendant denies that the aggregate amount payable to defendant by plaintiffs pursuant to the provisions of said policies of insurance is the sum of $491,379.41 and denies that the amount payable by each plaintiff under and by virtue of said ascertainment and said provision is that proportion of $491,379.41 which the face amount of each of said policies bears to the aggregate face amount of all of said policies.

XIII.

The allegations of paragraph XIII of the complaint are admitted.

XIV.

The allegations of paragraph XIV of the complaint are denied.

XV.

Defendant denies the allegations in paragraph XV of the complaint to the effect that said appraisal award was or is liberal in the amounts thereby determined, and that the loss and damage suffered by defendant as a result of said fire, within the contemplation of the coverage of said policies of insurance, was or is in fact substantially less than the amounts fixed in or determined by said appraisal award.

XVI.

Defendant denies that it ever intended or now intends, or that it has ever threatened to institute separate actions upon each of said policies of insurance, but alleges that, at the time the complaint was filed, defendant intended to bring a single action upon all of said policies in the State of California.

XVII.

Defendant adopts as a part of this Answer the paragraphs numbered III to V, both inclusive, and X to XVII, both inclusive, of Count 1 of defendant's Counterclaim herein.

Defendant, within a reasonable time, in a convenient forum, and in a form of action involving no unnecessary expense, delay, trouble, or any multiplicity of suits, has instituted a single action at

law upon all of said policies and has demanded a jury trial thereof. It would therefore be an abuse of discretion and a denial of defendant's right to a trial by jury guaranteed to defendant by the Seventh Amendment of the Constitution of the United States if this court should, as prayed in the alternative in the complaint determine and fix the amount of loss and damage suffered by defendant, except by a jury trial pursuant to Count II of defendant's Counterclaim.

Wherefore, defendant prays that the relief prayed for in plaintiff's complaint be denied.

COUNTERCLAIM

Count I.

I.

Defendant adopts by reference paragraphs I, II, and III of the complaint filed herein.

II.

On or about April 30, 1945, each of the plaintiffs did in the State of California, in consideration of a premium paid by defendant to each of plaintiffs, issue and deliver to defendant its policy or policies of insurance, known as use and occupancy or business interruption insurance, each insuring defendant against actual loss sustained by reason of total or partial suspension of business on account of destruction or damage by fire of any of defendant's property described in the policy. Each

policy was for a term of one year from and after April 30, 1945, and provided that the length of time of suspension for loss that may be claimed (a) shall not exceed seventy-five per cent (75%) of 365 calendar days; (b) shall not exceed such length of time as would be required, with due diligence and dispatch to rebuild, repair or replace such property therein described as may have been destroyed or damaged; and (c) shall commence with the date of the fire and not be limited by the date of expiration of the policy. A copy of the policy of insurance so issued by plaintiff, The Home Insurance Company, is attached to the complaint herein, marked Exhibit A and Exhibit B, and is adopted by reference and made a part hereof. Each of the policies issued by the plaintiffs is identical in form and substance to said policy issued by plaintiff, The Home Insurance Company, except that there is a difference as to the number of the policy, the name of the insurance company issuing the policy, the names of the persons who signed the policy on behalf of the various insurance companies, and the amount of the policy. The identifying number of and the amount of insurance provided for (as of July 7, 1945) in each of the policies so issued by plaintiffs is as follows:

Name of Plaintiff and Number of Policy	Amount
The American Insurance Company (027885)	$ 5,000
Atlas Assurance Company Limited (S–705012)	20,000
Caledonian Insurance Company (134336)	38,750
The Camden Fire Insurance Association (834784)	17,500
Columbia Insurance Company of New York (400443)	8,000
Commercial Union Assurance Company, Limited (923047)	25,000
The Continental Insurance Company (645621)	25,000
Fire Association of Philadelphia (PF–63798)	10,000
Fireman's Fund Insurance Company (A–34562)	17,000
Firemen's Insurance Company of Newark, New Jersey (29455)	15,000
Glens Falls Insurance Company (PCF–448625)	40,000
Globe and Rutgers Fire Insurance Company (38917)	5,000
Great American Insurance Company (56134)	20,250
The Hanover Fire Insurance Company (148251)	10,000
Hartford Fire Insurance Company (198018)	10,000
The Home Insurance Company (16517)	15,000
Insurance Company of North America (338100)	7,500
(Same) (OU–457353)	15,000
National Fire Insurance Company of Hartford (238990)	32,625
National Liberty Insurance Company of America (347379)	16,800
National Union Fire Insurance Company of Pittsburg, Pa. (118314)	15,000
New Hampshire Fire Insurance Company (41378)	30,000
New York Underwriters Insurance Company (137856)	20,000
New Zealand Insurance Company, Limited (133093)	25,000
The Northern Assurance Company, Limited (U–111058)	32,125
Norwich Union Fire Insurance Society Limited (93876)	12,500
Pearl Assurance Company, Limited (655548)	10,000
The Pennsylvania Fire Insurance Company (249446)	15,000
Queen Insurance Company of America (Q–86515)	32,750
St. Paul Fire & Marine Insurance Company (149178)	5,000
Scottish Union and National Insurance Company (F–62436)	5,000
Security Insurance Company, of New Haven (112553)	25,000
Springfield Fire and Marine Insurance Company (283551)	10,000
The Travelers Fire Insurance Company (205026)	17,500
United States Fire Insurance Company (CL–52793)	20,200
Westchester Fire Insurance Company (544918)	15,000
The Western Assurance Company (CL–3679)	7,500

The total amount of insurance provided for (as of July 7, 1945) in and by all of said policies is the aggregate sum of $651,000.00. At the time of the fire hereinafter referred to, defendant carried no use and occupancy or business interruption insurance other than or in addition to that contracted for by plaintiffs as aforesaid:

III.

At the time when said policies were issued, and at all times thereafter up until the event of the fire hereinafter mentioned, defendant owned and operated a plant for the manufacture of lumber and lumber products and owned a large amount of standing timber which it regularly cut and transported to its lumber plant. Said plant consisted of a saw mill, a planing mill, a box factory, dry kilns, engine and fuel houses, a log pond, and various other structures and equipment used in the manufacture of lumber and lumber products. Said saw mill was equipped with two saws and was so constructed that one side of said mill could be operated for the purpose of cutting logs into lumber without the operation of the other side of the mill. Said plant is the property which is described in each of the insurance policies issued by plaintiffs.

IV.

At approximately five o'clock in the afternoon on July 7, 1945, said saw mill was destroyed by fire which caused a complete suspension of business by defendant for a few days and caused a complete

suspension of the operation of the saw mill for more than one year thereafter. Each and every policy issued by the plaintiffs provided that as soon as practicable after any loss the insured should resume complete or partial operation of the property described in the policy and should make use of other property, if obtainable, if by so doing the amount of loss under the policy would be reduced and in the event of the loss being so reduced such reduction should be taken into account in arriving at the amount of the loss. At the time of the fire, defendant had on hand a large amount of lumber which it had procured by running its logs through its saw mill and which lumber was suitable for being used in said box factory for the manufacture of box shook. Defendant made inquiries concerning the procurement of machinery, equipment and materials for rebuilding the saw mill and from the information acquired, it appeared that one side of the saw mill could be rebuilt and put into operation within less than nine months of the date of the fire, thus permitting partial operation of the saw mill within the term insured by the policy. The timber owned by defendant is in mountainous country and in the winter months snow prevents the cutting of logs or the hauling of logs from the woods. Therefore, in order to carry on the partial operation of the saw mill within the nine-month period covered by the insurance policies, it was necessary to cut additional logs before such time as such operations

would be halted by snow. It was also necessary to haul logs from the woods which had resulted from cutting timber before the fire occurred, and to deck them at defendant's plant site, in order to arrest deterioration, decay, check and depreciation of said logs already cut. Therefore, pursuant to the provision of the policies for resumption of partial operation, defendant continued to cut logs in the woods and to transport such logs, (together with the logs which had already been cut before the fire occurred) from the woods to its plant site. Defendant's log pond was not large enough to receive so great a supply of logs, and therefore it was necessary to deck a great many of said logs at the plant site, which occasioned continuing expense, more particularly mentioned hereafter. Defendant also resumed partial operation by operating its box factory, and for that purpose used all of its supply of lumber suitable for the manufacture of box shook.

V.

After defendant had resumed partial operation, consisting of logging, transporting the logs to the plant site, decking the same and operating the box factory, defendant became apprised of the fact that neither side of the saw mill could be completed in time to resume operation of the saw mill within the nine-month period covered by the insurance policies, because it would not be possible to obtain the machinery and equipment necessary therefore, due to strikes. Whereupon defendant ceased its

logging operations, but continued to operate its box factory until all of its lumber available for the manufacture of box shook was consumed.

VI.

On or about March 22, 1946, each of the plaintiffs contributed to and advanced payment to defendant on account of the fire and loss, pending ascertainment of the amount of such loss. Said advance payment was in the aggregate amount of $250,000.00. The amount paid by each plaintiff to defendant by way of advance is as shown in column C of Exhibit "C" attached to the complaint. Said Exhibit "C" is hereby adopted by reference.

VII.

Defendant adopts paragraphs VII, VIII, and IX of the complaint by reference.

VIII.

Plaintiffs and defendant failed to agree within ten days after the notice of disagreement served by plaintiffs upon defendant as to the amount of loss under said policies of insurance. On or about February 21, 1947, and within the time provided by said policies of insurance, all of the plaintiffs, acting in concert, made a joint and single demand in writing for an appraisement and jointly named a single appraiser. Thereupon, within the time provided by each of said policies of insurance, defendant appointed a single appraiser. The two appraisers so chosen, before commencing the appraisement, selected a single umpire.

IX.

Thereafter the two appraisers and the umpire entered upon a single appraisement (otherwise acting pursuant to the provisions of each of said policies of insurance) and on or about April 18, 1947, the appraisers requested plaintiffs and defendant to extend the time for completion of the appraisement until May 3, 1947, to which all of the plaintiffs and defendant consented in writing. Within said time, as so extended, the appraisers made a single written award which was signed and verified by said two appraisers and by said umpire. By said written appraisement, the net profits prevented and the fixed charges and continuing expenses during the period from July 8, 1945, to April 7, 1946, as reduced by profits realized, and fixed charges and continuing expenses recovered by partial operation following the fire, were fixed at the amount of $581,000.00, the net profits prevented and charges and expenses which would normally have been earned during the period of twelve months immediately following the fire were fixed at the amount of $1,030,000.00, and expenses incurred by defendant other than those constituting costs of partial operation for the purpose of reducing the loss were fixed in the sum of $1,760.00.

X.

The only agreement that defendant ever made with any of the plaintiffs concerning an ascertainment of the amount of the loss (other than by agreement of the parties or a judgment) was made

by accepting the policies of insurance issued by the plaintiffs to the defendant, all of which provided (in the event of disagreement) for a mere appraisement of the loss, and not for an arbitration. Both parties construed the proceedings of the appraisers and the umpire to be an appraisement and not an arbitration. Defendant requested that the appraisers afford a hearing and the appraisers pursuant thereto gave notice of the time and place of the hearing and permitted the defendant and a representative of the plaintiffs to appear and permitted both to furnish figures and explanations of their claims and theories, but defendant did not procure the attendance at such hearing of any persons other than those who voluntarily appeared and did not request that any subpoena be issued for a number of persons whose attendance was desired by defendant but who would not voluntarily appear, because the appraisers had no right to issue a subpoena for a witness. At the hearing plaintiffs' representative announced that the appraisers were not confined to the information received at the hearing, but could inform themselves in any legitimate manner and from any legitimate source they saw fit, to which statement defendant offered no objection or exception. Those who appeared, both for defendant and for the plaintiffs, were not sworn. The appraisers and umpire did not, in arriving at their findings of fact, confine themselves to the information furnished at such hearing. Both before and after said hearing the

appraisers separately consulted with various parties ex parte, both as to facts and theories, and acted in part upon information received by such ex parte investigations, without affording the parties an opportunity to cross-examine or further inquire of the persons so interrogated, and without opportunity to the parties to furnish additional information on account of the information purported to have been given by the persons so interrogated and consulted ex parte.

XI.

Defendant notified all of the plaintiffs that it intended to dispute the validity of said award and refused to accept any payment thereunder, from such of the plaintiffs as tendered payment thereunder, and defendant has never received any sum whatsoever pursuant to the provisions of said award, but has only received aggregate payments on account in the sum of $250,000.00, which were made by the plaintiffs before the amount of the loss was ascertained or attempted to be ascertained, and before any proceedings were had for appraisement of the loss. The aggregate sum of $250,000.00 so received on account is substantially less than the amount due to defendant from all the plaintiffs, and the part thereof paid by each plaintiff is substantially less than the amount due from each such plaintiff to the defendant, whether said award be valid or invalid, all of which is conceded by each and all of the plaintiffs.

XII.

Said award is invalid and is not binding upon defendant, because the appraisers in arriving at the award and in fixing the amounts of the loss, the net profits prevented, the fixed charges and continuing expenses, the profits realized by partial operation after the fire, and the fixed charges and continuing expenses recovered by partial operation after the fire, mistook and exceed their authority, clearly misconceived their duties, undertook to construe and misconstrued provisions of the insurance policies, committed and acted upon fundamental and gross errors, both of law and of fact, made their calculations upon unlawful and erroneous bases, and wholly omitted items of loss which were covered and insured by each and every one of said policies of insurance, all of which more particularly appears hereafter.

XIII.

Pursuant to the provision in each of the policies that the insured should resume partial operation of the property described in each policy of insurance and should make use of other property if obtainable, if by so doing the amount of loss would be reduced, and in the event of the loss being so reduced such reduction should be taken into account in arriving at the amount of the loss hereunder, the appraisers and the umpire undertook to fix and ascertain the amount of profit made and realized by the partial operation of its plant and business dur-

ing the nine-month period immediately following the fire, and to deduct the amount so found from the net profits prevented and fixed charges and continuing expenses found by said appraisers. In making said calculation, the appraisers wrongfully, erroneously contrary to the provisions of the policies of insurance, and contrary to law, arbitrarily separated the partial operation of defendant's plant and business succeeding the fire and treated the same as two separate, distinct and unrelated partial operations. They arbitrarily, wrongfully, erroneuosly, and contrary to law, treated the operation of the box factory as separate and distinct from the logging operation. They fixed the amount of profit resulting from the operation of the box factory, considered as a separate and distinct operation and business, and subtracted the amount of the profit so fixed and ascertained from the amount of profits prevented and fixed charges and continuing expenses. The defendant, as part and parcel of the partial operation after the fire, engaged in logging for the reasons and to the extent heretofore alleged. By reason thereof and by reason of the fact that the logs cut and on hand could not be promptly sawed into lumber, depreciation occurred in said logs because of rot, stain, check and brashness. The amount of such depreciation in said logs which occurred within the nine-month period immediately following the fire was more than $36,000.00. The appraisers and the umpire did not question the amount of such depreciation, and made no finding

that the same was of a different or less amount, but they wrongfully, erroneously and mistakenly, and contrary to law, failed to allow the amount of this loss and depreciation, and failed to treat it as part of the expense of partial operation after the fire, and wrongfully, erroneously and mistakenly failed to treat said loss of worth in said logs as depreciation within the meaning of the insuring clause of the policy insuring continuing fixed charges and expenses. By wrongfully, erroneously and mistakenly failing to treat said loss of worth in said logs as not constituting depreciation within the meaning of the insurance policies, and by wrongfully, erroneously and mistakenly failing to treat the logging operation as part of the partial operation after the fire, and by wrongfully, erroneously and mistakenly failing to treat said loss in worth of said logs as part of the expense of operation after the fire, the appraisers and the umpire misconstrued their authority and duty, and they committed, grave, gross and fundamental errors of both law and fact.

XIV.

One of the effects of the fire was to cripple and reduce the efficiency of defendant's plant. As a result thereof, it was more expensive for defendant to continue partial operation after the fire. The figures taken from the defendant's books and presented to the appraisers showed that additional expense for logging amounted to more than $42,000.00. Said expenses were not estimated, but were

actually incurred, the actual amount thereof was correctly entered upon defendant's books, and the correctness of defendant's books and of said figures was not disputed or questioned by the appraisers, and they made no finding that said excessive logging cost was in any different or smaller amount, but they failed to make any allowance on account of said excessive cost of logging. The appraisers thereby misconceived their powers and duties and thereby committed gross error of law and fact.

XV.

The defendant was likewise put to extra expense in its mill and yard operation because of such crippled and inefficient condition in the sum of more than $15,500.00, all of which was actually incurred and correctly entered upon defendant's books, and which expense constituted continuing expense insured by the policies of insurance. The appraisers did not find that said figures were incorrect and they did not find that said expense was in any different or lesser amount, but they wrongfully failed to allow said amount and thereby committed a gross error.

XVI.

None of the errors above alleged arose in connection with the estimation of the amount of profits prevented, but all arose and occurred in the calculations and findings concerning actual income and outgo after the fire. All had to do with matters which actually occurred, the amounts of which had

been definitely ascertained and correctly entered upon defendant's books. None of said errors occurred on account of any conflict of evidence or on account of any inaccuracy or insufficiency found by the appraisers or the umpire as to any of defendant's books and figures. None occurred as to any item, the amount of which is a mere matter of estimation or judgment, but all occurred because the appraisers and the umpire exceeded their authority in construing terms of the policy of insurance.

XVII.

The appraisers failed to make any agreement as to whether any of the matters or items mentioned in Articles XIII, XIV, and XV of this count of this counterclaim should or should not be allowed as items of loss and damage to defendant, and they disagreed as to whether such items were within the terms of the policies. Instead of referring their differences to the umpire for his decision, they made a compromise agreement and allowed as loss and damage the sum of $25,000.00 in lieu and instead of all of said three items of loss and damage to defendant's injury in the sum of more than $68,000.00. Said sum of $25,000.00 allowed as aforesaid did not represent the judgment or finding of the appraisers, or of the umpire, or of any one of them concerning the amount of said three items of loss and damage, or of any one or more of them, but was the amount on which said appraisers agreed by compromise. Thereby said appraisers

exceeded their authority and committed a gross error. The appraisers entered into a compromise agreement, holding that to be a profit which was not a profit, erroneously treating the logging operation as no part of the partial operation after the fire, construing the partial operation after the fire as two separate and distinct operations, refusing to treat expenses incident to logging and operation of the mill and yard after the fire as a part of the expense of partial operation after the fire, wrongfully construing the loss in worth of the logs after the fire as not being depreciation and therefore not continuing expense within the meaning of the policies and as not a reduction of the amount of profit realized by partial operation after the fire.

XVIII.

The appraisers and the umpire, in calculating the amount of profit made by the operation of the box factory after the fire, wrongfully, erroneously, mistakenly, and contrary to law, deducted from gross income of the box factory the amount for which the lumber used and consumed in the operation of the box factory could have lawfullly been sold under O.P.A. ceiling prices, instead of deducting from gross income the cost of such lumber. At the time when the fire occurred, and continuously thereafter during the entire nine-month period insured, O.P.A. ceiling prices were in force and effect on lumber. The United States of America was at war with the governments of Germany and

Japan, and was shipping vast quantities of supplies to Australia, China, certain Pacific Islands, Africa, Iceland, England, Russia, and other parts of the world. There was an unprecedented demand for box shook. The United States Government placed ceiling prices upon lumber which would require lumber suitable to be manufactured into box shook to be sold for less than cost, but placed O.P.A. ceiling prices on box shook which would permit the sale of box shook at a good profit. As a result of said O.P.A. ceiling prices, only a few grades of lumber could be sold at any profit at all, and even such lumber could not be sold at prices which would realize as great a profit as could be realized by the manufacture and sale of box shook. As a result of such O.P.A. ceiling prices, there was no market for lumber suitable for box shook. Such lumber could not be bought in the market or for the prices which might lawfully be paid under O.P.A. regulations. There is no difference in the actual cost of producing lumber which is sold after it has passed through the saw mill or after it has passed through the saw mill and the planing mill, and lumber which is used for the manufacture of box shook. During the entire nine-month period following the fire lumber to be used for the manufacture of box shook was of greater value to defendant than lumber to be sold after it had passed through the saw mill and the planing mill because, under O.P.A. ceiling prices, a greater profit could be made upon the lumber manufactured into box shook. O.P.A. ceiling prices

did not represent and were not intended to represent either the cost or value of lumber suitable to be manufactured into box shook, but said O.P.A. ceiling prices were far below the actual cost of the manufacture of said lumber, and applicable to all lumber of like kind and character without regard to the cost thereof to the owner. In the transaction of its regular business defendant did not sell any of its lumber suitable for the manufacture of box shook and never, at any time, contracted with any of the plaintiffs to do so, or to charge itself with the loss that would have been incurred by doing so.

XIX.

Defendant, in making its proof of loss and in presenting its figures for the consideration of the appraisers and the umpire, ascertained the entire cost of the production of lumber, both that which was and that which was not used for the manufacture of box shook, and in computing the profit made by the operation of the box factory, deducted the cost of the lumber consumed in the manufacture of box shook from the gross income from the operation of the box factory. For that purpose defendant used average cost of lumber, notwithstanding the fact that a greater average profit could be made (calculated upon that basis) by using lumber for the manufacture of box shook, than the average profit (calculated upon such basis) from the sale of both lumber and box shook. The appraisers and umire did not find that defendant had incorrectly computed such average cost. Nevertheless, in com-

puting the cost of lumber used in the box factory, they treated O.P.A. ceiling prices on all lumber used for the manufacture of box shook as the cost thereof. By reason thereof, they found the profit made by the operation of the box factory in the nine months immediately succeeding the fire to be more than $73,000.00 in excess of the actual profit made thereby, and thus reduced the amount of the actual loss found by them by that amount. In so doing, the appraisers and the umpire wrongfully, erroneously and mistakenly construed Section 10 of each of the policies of insurance, thereby exceeding their authority, and committing grave, gross and fundamental mistakes of both law and fact.

XX.

Section 4 of each of the policies issued by the plaintiffs to the defendant was as follows:

"'Contribution Clause'—It is expressly stipulated and made a condition of this contract that, in the event of loss, this company shall be liable for no greater proportion thereof than the amount hereby insured bears to seventy five per cent (75%) of the total of the net profits (Item I) and charges and expenses (as specified in Item II) which would normally have been earned during the period of twelve (12) months immediately following the fire."

The phrase "as specified in Item II)" appearing in said contribution clause refers to Item II in the insuring clause in each of said policies which, by its express terms, refer, not to all charges and ex-

penses which would occur during a normal year, but only to fixed charges and expenses which must necessarily continue during a total or partial suspension of business.

In attempting to follow the provisions of said Section 4 of said policies, the appraisers, in arriving at the fixed charges and expenses which would normally have been earned during the period of twelve months immediately following the fire, included in said amount the sum of $15,042.00 which was the amount which the appraisers determined would have been the depreciation on the destroyed saw mill in the year following the date when the fire occurred had no fire occurred. Said saw mill was destroyed by fire, which fact said appraisers knew and found to be a fact, and no depreciation in fact occurred upon said saw mill after it was burned and destroyed, which fact was likewise known to the appraisers. The appraisers allowed nothing by way of damage on account of any part of said depreciation on said destroyed saw mill as a fixed charge or continuing expense, but held that the amount thereof that would have occurred in nine months was recovered in the logging operation after the fire, whereas no depreciation was ever recovered by defendant. The appraisers added said sum of $15,042.00 to the amount of fixed charges and expenses during the period of twelve months immediately following the fire because said Section 4 referred to charges and expenses which would normally have been earned during said twelve

months, and they construed this provision concerning what would normally have occurred to require them to include said depreciation in said twelve-month period, notwithstanding the fact that no depreciation whatsoever occurred upon said sawmill, during either the nine months or the twelve months immediately following the fire. The appraisers overlooked and ignored the fact that said Section 4 referred only to charges and expenses which must necessarily continue during partial suspension of business, as specified in Item II of the insuring clause. In the manner aforesaid, the appraisers misconstrued said policies of insurance and exceeded their authority and committed a gross error of law. The effect of misconstruing said policy and erroneously adding said sum of $15,042.00 to the amount of fixed charges and expenses for said twelve-month period was to raise the total amount of the net profits and charges and expenses for the twelve-month period following the fire to such an extent that the amount of damage, as found by the commissioners for which defendant could recover under the provisions of said contribution clause, was reduced more than $7,000.00.

XXI.

By reason of the fundamental, gross, and palpable errors of law and fact, by reason of the fact that the appraisers and the umpire exceeded their authority in construing terms of the insurance policies, in misconstruing said policies, and in entering into a compromise agreement, and by reason of the fact

that the award does not allow for all the items of loss, said award is invalid and void.

Wherefore, defendant prays that the award rendered and returned by the appraisers and the umpire be declared invalid and that it be vacated and set aside.

Count II

I.

Defendant adopts by reference paragraphs I, II, and III of the complaint herein.

II.

In consideration of a premium paid to each plaintiff respectively by defendant, each of the plaintiffs did, in the State of California, on or about April 30, 1945, issue and deliver to defendant the policy or policies of insurance known as use and occupancy or business interruption insurance. A copy of the policy of insurance so issued by plaintiff, The Home Insurance Company, is attached to the complaint herein, Marked Exhibit A and B, and is made a part hereof and adopted by reference. Each of said policies of insurance was identical in form and substance to said policy issued by plaintiff, The Home Insurance Company, except as to the name of the company issuing the policy, the signatures thereto, the amount of insurance, the identifying number of and the amount of insurance provided for. The identifying number of and the amount of insurance provided for in each of said policies (as of July 7, 1945) are set forth in Article II of Count

I of this counterclaim, which Article is hereby adopted by reference.

III.

The total amount of insurance provided for, as of July 7, 1945, in and by all of said policies is the aggregate sum of $651,000.00. At the time of the fire hereinafter mentioned, defendant carried no use and occupancy or business interruption insurance other than, or in addition to, the insurance evidenced by the policies last above mentioned.

IV.

There is diversity of citizenship as between the defendant and each and every one of the plaintiffs and the amount in controversy in this suit, exclusive of interest and costs, as between defendant and each and every one of the plaintiffs, exceeds $3,000.00.

V.

Defendant asserts against each of the plaintiffs severally right to relief in respect of and arising out of the same occurrence, namely, the fire and loss resulting therefrom hereinafter mentioned, and questions of both law and fact common to all of them will arise in this action within the meaning of Rule 20 of the Federal Rules of Civil Procedure.

VI.

It was and is a condition of each policy issued by plaintiffs to defendant that if the buildings and/or structures and/or machinery and/or equipment and/or supplies and/or all that property upon

which the printed conditions of the policy require that liability be specifically assumed in, on and/or under "plant site," "Athletic field" and "town site" premises situate at and near Standard, Tuolumne County, California, and occupied or used for woodworking or mercantile, or for any other purposes, including (but not limited to) town site purposes or purposes incidental or related to such woodworking or mercantile operations, be destroyed or damaged by fire occurring during the term of the policy so as to necessitate a total or partial suspension of business, the company issuing the policy shall be liable under such policy for any such actual loss sustained by reason of such suspension.

VII.

By each policy, the plaintiff who issued the same insured defendant to an amount not exceeding the face amount of said policy against loss occurring during the term of the policy consisting of (Item 1) the net profits on the business which is thereby prevented; and (Item 2) fixed charges and expenses, to the extent to which they would have been earned had no fire occurred, as follows: Salaries of indispensable employees, superintendents, executives, salesmen and/or employees under contract, taxes, interest, rents, royalties, insurance premiums, depreciation, advertising, special contracts, dues, subscriptions, directors' fees, accounting expenses, legal expenses and fees, light, heat and power, and such other fixed charges and expenses which must neces-

sarily continue during total or partial suspension of business.

VIII.

Each policy provided that any income derived from or expenses incurred in the store and townsite operation of the insured are not covered by the policy and such income and expenses shall not be considered in the application of the average clause made a part thereof; that the length of time of such suspension for which loss may be claimed shall not exceed 75% of 365 calendar days, shall not exceed such length of time as would be required with due diligence and dispatch to rebuild, repair or replace such property therein described as may have been destroyed or damaged and shall commence with the date of the fire and not be limited by the date of expiration of the policy.

IX.

Each policy provided that in the event of loss the company issuing the policy shall be liable for no greater proportion thereof than the amount thereby insured bears to 75% of the total of the net profits (Item I) and charges and expenses (as specified in Item II) which would normally have been earned during the period of twelve months immediately following the fire; that the company issuing the policy should not be liable, as to net profits, for more than the net profits prevented by the total or partial suspension of business, nor for charges and expenses in excess of those which must

necessarily continue during a total or partial suspension of business, and then only to the extent to which such charges and expenses would have been earned had no fire occurred; but nevertheless said company shall be liable for such expenses as may be incurred for the purpose of reducing any loss under the policy, not exceeding, however, the amount in which the loss is so reduced; that in determining the amount of net profits and charges and expenses that would have been earned had no fire occurred, whether for the purpose of ascertaining the amount of loss sustained or in the application of the contribution clause, due consideration shall be given to the experience of the business before the fire and the probable experience thereafter; that the word "day," however modified, wherever used in the policy, shall be held to cover a period of twenty-four hours.

X.

Each policy provides that, as soon as practicable after any loss, the insured shall resume complete or partial operation of the property therein described and shall make use of other property, if obtainable, if by so doing the amount of loss thereunder will be reduced, and in the event of the loss being so reduced such reduction shall be taken into account in arriving at the amount of loss thereunder; that the company issuing the policy shall in no event be liable for loss resulting from damage to or destruction of finished stock or for the time required to reproduce any finished stock which

may be damaged or destroyed; that if liability for suspension of business due to damage to or destruction of raw stock is specifically assumed thereunder, such liability shall be limited to that period of time for which the damaged or destroyed raw stock would have made operations possible, but in no event to exceed the time limit therein specified.

XI.

Each policy provided that the total liability for business interruption loss caused by fire and/or consequential damage shall in no case exceed the total amount of said policy in effect at the time of the loss.

XII.

Each policy provided that after the commencement of the fire, the insured shall render the company that issued the policy preliminary proof of loss consisting of a written statement signed and sworn to by assured, setting forth (a) his knowledge and belief as to the origin of the fire, (b) the interest of the insured and of all others in the property, (c) the cash value of the different articles or properties and the amount of loss thereon, (d) all encumbrances thereon, (e) all other insurance, whether valid or not, covering any of said articles or properties, (f) a copy of the descriptions and schedules in all other policies unless similar "to this policy" and in that event a statement as to the amounts for which the different articles or properties are insured in each of the other policies, (g)

any changes of title, use, occupation, location or possession of said property since the issuance "of this policy," (h) by whom and for what purpose any building therein described and the several parts thereof were occupied at the time of the fire; that if the insurance company claims that the preliminary proof of loss is defective and within five days after the receipt thereof notifies in writing the insured of the alleged defect and requests that they be remedied by verified amendments, the insured within ten days after receipt of such notification and request must comply therewith or if unable to do so present to the insurance company an affidavit to that effect; that the company issuing the policy shall be deemed to have assented to the amount of the loss claimed by insured in his preliminary proof of loss unless within twenty days after receipt thereof, or if verified amendments have been requested, within twenty days after their receipt, or within twenty days after the receipt of an affidavit that the insured is unable to furnish such amendments, the company issuing the policy shall notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him and shall also notify him in writing of the amount of loss, if any, the company admits on each of the different articles or properties set forth in the preliminary proof or amendments thereto; that if the insured and the company issuing the policy fail to agree in whole or in part as to the amount of loss within ten days after such notifica-

tion, the company issuing the policy shall forthwith demand in writing an appraisement of the loss or part of loss as to which there is disagreement and shall name a competent and disinterested appraiser and insured within five days after receipt of such demand and name shall appoint a competent and disinterested appraiser and notify the company thereof in writing and the two so chosen shall before commencement of the appraisement select a competent and disinterested umpire; that the appraisers together shall estimate and appraise the loss or part of loss as to which there is a disagreement, stating separately the sound value and damage, and if they fail to agree they shall submit their differences to the umpire and the award in writing, duly verified by any two, shall determine the amount or amounts of such loss.

XIII.

At the time that each of such policies was issued and continually thereafter defendant was the owner of the premises and properties described in each of said policies. At the time that each of said policies was issued, and continuously thereafter until the date of the fire hereafter mentioned, defendant was engaged in the business of manufacturing and selling lumber and lumber products, and as an incident to such business it owned large amounts of standing timber, together with equipment necessary and appropriate for cutting, transporting and handling the same upon the location

described in each of said policies. Defendant owned and operated a lumber manufacturing plant, including a saw mill, a planing mill and a box factory, (all located on the premises described in each policy) which defendant regularly used in its business for the purpose of manufacturing lumber and lumber products.

XIV.

On the evening of July 7, 1945, a fire occurred on the premises described in each of said policies which damaged and destroyed the saw mill which was part of the property described in each of said policies, so as to necessitate a suspension of defendant's business. By reason of such suspension defendant sustained actual loss consisting of the net profits on defendant's business which were prevented by such fire and suspension of business, and of fixed charges and expenses defined in "Item II" in each of said policies, which fixed charges would have been completely earned by defendant had no fire occurred, in the following amounts:

	During Nine Months Immediately Succeeding the Fire	During Twelve Months Immediately Succeeding the Fire
Profits Prevented	$266,241.60	$358,458.56
Fixed Charges and Expenses	538,927.93	646,190.47
Totals	$805,169.53	$1,004,649.03

XV.

Defendant rebuilt, repaired and replaced the property so damaged and destroyed with due diligence and dispatch. The time required for such

rebuilding, repair and replacement exceeded one year, and said rebuilding, repair and replacement could not have been effected in a shorter length of time.

XVI.

Said fire did not prevent defendant's logging operation nor destroy said box factory. After said fire defendant had on hand a large amount of lumber which had been produced by running logs through defendant's saw mill, which lumber was suitable for use in said box factory for the manufacture of box shook. Wherefore, pursuant to the provision in each of said policies, that insured should resume complete or partial operation of the property and should make use of other property, if obtainable, if by so doing the amount of loss under the policy would be reduced, defendant, as soon as practicable after said fire and said loss, resumed partial operation of said property described in each policy and partial operation of its business by continuing its logging and the operation of its said box factory, made use of said lumber suitable for the manufacture of box shook, and by said partial operation defendant made a profit of $63,165.12. The net loss to defendant during the nine months immediately succeeding said fire, and on account of said fire, and sustained by reason of the partial suspension of defendant's business necessitated by the destruction and damage of defendant's property by said fire, as reduced by said partial operation was and is in excess of $742,004.41.

XVII.

By reason of the facts hereinabove stated, the amount which defendant is entitled to recover under all of said policies is in excess of the sum of the face value of all of said policies, and each plaintiff thereby became and is liable to defendant for the full face amount of the policy or policies issued by it.

XVIII.

On March 7, 1946, each of the plaintiffs made a payment to defendant in part payment of its liability to defendant upon the policy or policies issued by each plaintiff respectively. The number of the policy, the face amount thereof, the amount of said partial payment and the balance due from each defendant (exclusive of interest thereon) is as follows:

Policy No.	Name of Insurance Company	Face Amount of Policy	Advance Payment on Claim March, 1946	Balance Claimed
027885	The American Insurance Co.	$ 5,000.00	$ 1,920.12	$ 3,079
S–705012	Atlas Assurance Company, Ltd.	20,000.00	7,680.49	12,319
134336	Caledonian Insurance Company	38,750.00	14,880.95	23,869
834784	The Camden Fire Insurance Association	17,500.00	6,720.43	10,779
400443	Columbia Insurance Company of New York	8,000.00	3,072.20	4,927
923047	Commercial Union Assurance Company, Limited	25,000.00	9,600.61	15,399
645621	The Continental Insurance Co.	25,000.00	9,600.61	15,399
PF–63798	Fire Association of Philadelphia	10,000.00	3,840.25	6,159
A–34562	Fireman's Fund Insurance Co.	17,000.00	6,528.42	10,471
29455	Firemen's Insurance Company of Newark, New Jersey	15,000.00	5,760.37	9,239
PCF 448625	Glens Falls Insurance Company	40,000.00	15,360.98	24,639
38917	Globe and Rutgers Fire Insurance Company	5,000.00	1,920.12	3,079

..cy No.	Name of Insurance Company	Face Amount of Policy	Advance Payment on Claim March, 1946	Balance Claimed
4	Great American Insurance Company	20,250.00	7,776.50	12,473.50
51	The Hanover Fire Insurance Co.	10,000.00	3,840.25	6,159.75
18	Hartford Fire Insurance Co.	10,000.00	3,840.25	6,159.75
7	The Home Insurance Company	15,000.00	5,760.37	9,239.63
00	Insurance Company of North America	7,500.00	2,880.18	4,619.82
457353	Insurance Company of North America	15,000.00	5,760.37	9,239.63
90	National Fire Insurance Company of Hartford	32,625.00	12,528.80	20,096.20
79	National Liberty Insurance Company of America	16,800.00	6,451.61	10,348.39
14	National Union Fire Insurance Company of Pittsburg, Pa.	15,000.00	5,760.37	9,239.63
8	New Hampshire Fire Insurance Company	30,000.00	11,520.74	18,479.26
56	New York Underwriters Insurance Company	20,000.00	7,680.49	12,319.51
93	New Zealand Insurance Company, Limited	25,000.00	9,600.61	15,399.39
1058	The Northern Assurance Company, Limited	32,125.00	12,336.79	19,788.21
6	Norwich Union Fire Insurance Society, Limited	12,500.00	4,800.31	7,699.69
48	Pearl Assurance Company, Ltd.	10,000.00	3,840.25	6,159.75
46	The Pennsylvania Fire Insurance Company	15,000.00	5,760.37	9,239.63
6515	Queen Insurance Company of America	32,750.00	12,576.81	20,173.19
78	St. Paul Fire & Marine Insurance Company	5,000.00	1,920.12	3,079.88
2436	Scottish Union and National Insurance Company	5,000.00	1,920.12	3,079.88
53	Security Insurance Company of New Haven	25,000.00	9,600.61	15,399.39
51	Springfield Fire and Marine Insurance Company	10,000.00	3,840.25	6,159.75
26	The Travelers Fire Insurance Company	17,500.00	6,720.43	10,779.57
2793	United States Fire Insurance Company	20,200.00	7,757.30	12,442.70
18	Westchester Fire Insurance Co.	15,000.00	5,760.37	9,239.63
679	The Western Assurance Co.	7,500.00	2,880.18	4,619.82
	Totals	$651,000.00	$250,000.00	$401,000.00

XIX.

Each plaintiff agreed with defendant that defendant might have more time than that fixed by the policy within which to render to plaintiffs preliminary proof of loss, and within the extended time so allowed and agreed upon, defendant rendered to each and all of the plaintiffs preliminary proof of loss executed and containing the allegations and information as required by each of said policies of insurance.

XX.

By each proof of loss, defendant made claim of loss in the total amount of $742,004.41 and claimed that the liability of all the plaintiffs to defendant was in the aggregate sum of $651,000.00.

XXI.

Defendant adopts paragraphs VIII and IX of the complaint herein by reference.

XXII.

Plaintiffs and defendant failed to agree within ten days after said notice of disagreement as to the amount of the loss. On or about February 21, 1947, and within the time provided by each of said policies of insurance, plaintiffs jointly demanded in writing an appraisement, but otherwise pursuant to the terms of each of said policies and jointly named a single appraiser. Defendant thereupon appointed a single appraiser. The two appraisers so chosen,

before commencing the appraisement, selected an umpire.

XXIII.

Defendant adopts paragraph XI of the complaint herein by reference.

XXIV

Said award is invalid. Defendant has instituted an action in this court and in this cause, as set forth in Count I of defendant's counterclaim to procure a decree of this court that said award is invalid and that the same be vacated.

Wherefore, defendant prays:

1. That the Second Count of defendant's counterclaim be tried to a jury after Count I of this counterclaim has been tried to the court, and after said award has been held to be invalid and vacated by the decree of this Court;

2. That defendant have and recover judgment against each of the plaintiffs severally in amounts as follows:

The American Insurance Company	$ 3,079.88
Atlas Assurance Company, Limited	12,319.51
Caledonian Insurance Company	23,869.05
The Camden Fire Insurance Association	10,779.57
Columbia Insurance Company of New York	4,927.80
Commercial Union Assurance Company, Limited	15,399.39
The Continental Insurance Company	15,399.39
Fire Association of Philadelphia	6,159.75
Fireman's Fund Insurance Company	10,471.58
Firemen's Insurance Company of Newark, New Jersey	9,239.63
Glens Falls Insurance Company	24,639.02
Globe and Rutgers Fire Insurance Company	3,079.88
Great American Insurance Company	12,473.50
The Hanover Fire Insurance Company	6,159.75
Hartford Fire Insurance Company	6,159.75
The Home Insurance Company	9,239.63
Insurance Company of North America	4,619.82
Insurance Company of North America	9,239.63
National Fire Insurance Company of Hartford	20,096.20
National Liberty Insurance Company of America	10,348.39
National Union Fire Insurance Company of Pittsburg, Pa.	9,239.63
New Hampshire Fire Insurance Company	18,479.26
New York Underwriters Insurance Company	12,319.51
New Zealand Insurance Company, Limited	15,399.39
The Northern Assurance Company, Limited	19,788.21
Norwich Union Fire Insurance Society, Limited	7,699.69
Pearl Assurance Company, Limited	6,159.75
The Pennsylvania Fire Insurance Company	9,239.63
Queen Insurance Company of America	20,173.19
St. Paul Fire & Marine Insurance Company	3,079.88
Scottish Union and National Insurance Company	3,079.88
Security Insurance Company, of New Haven	15,399.39
Springfield Fire and Marine Insurance Company	6,159.75
The Travelers Fire Insurance Company	10,779.57
United States Fire Insurance Company	12,442.70
Westchester Fire Insurance Company	9,239.63
The Western Assurance Company	4,619.82

Defendant also prays judgment against each plaintiff for interest at the rate of Seven Per Cent (7%) per annum on $401,000.00 from the date when due in accordance with the provisions of said policies and pursuant to law, until said judgment is paid, said interest to be apportioned among the

several plaintiffs in proportion to the several judgments rendered against them.

3. Defendant further prays judgment against all of the plaintiffs for the costs of this suit.

SEVERSON, BROWN,
KEOUGH & McCALLUM,
WATSON, ESS, BARNETT,
WHITTAKER & MARSHALL
and
PAUL BARNETT,

By /s/ HAROLD C. BROWN,
Attorneys for Defendant.

Demand For A Trial By Jury

Defendant demands a trial by jury of all issues of fact arising in the trial herein, except as to Count I of defendant's counterclaim as provided by Rule 38(b) of the Federal Rules of Civil Procedure.

SEVERSON, BROWN,
KEOUGH & McCALLUM,
WATSON, ESS, BARNETT,
WHITTAKER & MARSHALL
and
PAUL BARNETT,

By /s/ HAROLD C. BROWN,
Attorneys for Defendant.

Receipt of copy attached.

[Endorsed]: Filed April 30, 1948.

[Title District Court and Cause.]

REPLY TO COUNTERCLAIM

(In Second Amended Answer)

For reply to the counterclaim contained in defendant's second amended answer and counterclaim, plaintiffs say:

First Defense

The counterclaim, and each count thereof, fails to state any defense, claim, or counterclaim against plaintiffs, or any of them, upon which relief can be granted.

Second Defense

First Count of Counterclaim:

1. Plaintiffs admit the allegations contained in paragraphs I, II, III, VI, VII, VIII, and XI.

2. Plaintiffs deny the allegations contained in paragraphs XII, XVI, and XXI.

3. Plaintiffs are without knowledge or information sufficient to form a belief as to the allegations of paragraph XVII.

4. As to the allegations of paragraph IV: Plaintiffs admit that at approximately five o'clock in the afternoon on July 7, 1945, said saw mill was destroyed by fire which caused a complete suspension of business by defendant for a few days and caused a complete suspension of the operation of the saw

mill for more than one year thereafter; that at the time of the fire defendant had on hand a large amount of lumber which it had procured by running its logs through its saw mill and which lumber was suitable for being used in said box factory for the manufacture of box shook; that defendant made inquiries concerning the procurement of machinery, equipment and materials for rebuilding the saw mill, and from the information acquired it appeared that one side of the saw mill could be rebuilt and put into operation within less than nine months of the date of the fire, thus permitting partial operation of the saw mill within the term insured by the policy; that the timber owned by defendant is in mountainous country and in the winter months snow prevents the cutting of logs or the hauling of logs from the woods; that defendant did cut additional logs after the fire and before such time as such operations would be halted by snow, and did haul logs from the woods which had resulted from cutting timber before the fire occurred, and did deck them at defendant's plant site, and that such decking did arrest deterioration, decay, check and depreciation of said logs already cut; that defendant continued to cut logs in the woods and to transport such logs, together with the logs which had already been cut before the fire occurred, from the woods to its plant site; that defendant's log pond was not large enough to receive so great a supply of logs, and that defendant did deck a great many of said logs at the plant site, and that this decking of logs

occassioned expense to defendant; that defendant also resumed partial operation by operating its box factory, and for that purpose used all of its supply of lumber suitable for the manufacture of box shook.

Plaintiffs deny that any policy issued by plaintiffs provided as stated in the second sentence of said paragraph IV, or provided other than as stated in the policies themselves.

Plaintiffs deny every allegation of said paragraph IV not hereinabove expressly admitted.

5. As to the allegations of paragraph V: Plaintiffs admit that defendant ceased its logging operations prior to expiration of nine months from the date of the fire, but continued to operate its box factory until all of its lumber available for the manufacture of box shook was consumed.

Plaintiffs deny every allegation of said paragraph V not hereinabove expressly admitted.

6. As to the allegations of paragraph IX: Plaintiffs admit the allegations of said paragraph IX, except that plaintiffs deny that in any respect the appraisers or umpire acted otherwise than pursuant to and in accordance with the provisions of each of said policies of insurance. In this connection, plaintiffs allege that the holding of a single appraisement and the actions of the appraisers and umpire in this regard were in all respects and at all times consented and agreed to and acquiesced in by defendant.

7. As to the allegations of paragraph X: Plaintiffs admit and allege that the proceeding for ascertainment of the loss through the appraisers and umpire herein was had pursuant to the provisions of the said policies of insurance; that the appraisers and umpire gave defendant as well as plaintiffs full opportunity to present all evidence, figures, explanations, arguments, and data and information of whatever kind, which either desired to present, and held hearings for that purpose upon notice to all parties; that defendant did not request that any subpena or subpenas be issued during the course of the appraisement or in connection therewith; that defendant offered no objection or exception to the proposition expressed during the course of the appraisement that the appraisers and umpire were not confined to the information received at the hearing but could inform themselves in any legitimate manner and from any legitimate source they saw fit; that those who appeared and testified for defendant and plaintiffs at the said hearings were not sworn. In this connection, plaintiffs allege that the actions and procedures of the appraisers and umpire hereinbefore referred to were in all respects and at all times consented and agreed to and acquiesced in by defendant.

Plaintiffs are without knowledge or information sufficient to form a belief as to the allegations of the last two sentences of said paragraph X, commencing "The appraisers and umpire did not . . .", and ending ". . . consulted ex parte."

Plaintiffs deny every allegation of said paragraph X not hereinabove expressly admitted.

8. As to the allegations of paragraph XIII: Plaintiffs are without knowledge or information sufficient to form a belief as to the allegations of said paragraph XIII; except that plaintiffs admit that defendant, as part and parcel of the partial operation after the fire, engaged in logging, and that the logs cut and on hand could not be promptly sawed into lumber, and that some small amount of depreciation may have occurred in said logs because of rot, stain, check, and brashness, but defendant denies that the amount of such depreciation in said logs which occurred within the nine-month period immediately following the fire was more than $36,000, or exceeded a nominal amount, and plaintiffs allege that the minor amount of depreciation that may have occurred was either irrelevant because absorbed by the market conditions then and subsequently in existence or was a consequential loss not covered by the said policies of insurance.

9. As to the allegations of paragraph XIV: Plaintiffs admit that one of the effects of the fire was to cripple and reduce the efficiency of defendant's plant, and that as a result thereof it was more expensive for defendant to continue partial operation after the fire.

Plaintiffs are without knowledge or information sufficient to form a belief as to the allegations of the

last seven lines of said paragraph XIV, commencing "and the correctness . . .", and ending ". . . gross error of law and fact."

Plaintiffs deny every allegation of said paragraph XIV not hereinabove expressly admitted.

10. As to the allegations of paragraph XV: Plaintiffs are without knowledge or information sufficient to form a belief as to the allegations of the last sentence of said paragraph XV, commencing "The appraisers . . .", and ending ". . . a gross error."

Plaintiffs deny every other allegation of said paragraph XV.

11. As to the allegations of paragraph XVIII: Plaintiffs are without knowledge or information sufficient to form a belief as to the allegations of the first sentence of said paragraph XVIII, commencing "The appraisers . . .", and ending ". . . cost of such lumber."; and as to the allegations contained in the last sentence on page 16, commencing "The United States . . .", and ending ". . . parts of the world.", except that plaintiffs admit that the United States was at war with the governments of Germany and Japan; and as to the allegations contained in the sentence about the middle of page 17, reading "Such lumber could not be bought in the market or for the prices which might lawfully be paid under O.P.A. regulations."

Plaintiffs admit that at the time when the fire occurred, and continuously thereafter during the

entire nine-month period insured, O.P.A. ceiling prices were in force and effect on lumber; that there was an unprecedented demand for box shook; that the United States government placed O.P.A. ceiling prices on box shook which would permit the sale of box shook at a good profit, and that generally other grades of lumber could not be sold at prices which would realize as great a profit as could be realized by the manufacture and sale of box shook; that during the entire nine-month period following the fire, lumber to be used for the manufacture of box shook was of greater value to defendant than lumber to be sold after it had passed through the saw mill and the planing mill because under O.P.A. ceiling prices a greater profit could be made upon the lumber manufactured into box shook, and in this connection plaintiffs allege that the additional profit to be made upon lumber manufactured into box shook resulted from the fact of the re-manufacturing process and would result and did result regardless of whether market prices were under government control or not; that in the transaction of its regular business defendant did not sell any of its lumber suitable for the manufacture of box shook and never at any time contracted with any of the plaintiffs to do so or to charge itself with any loss that might be so incurred, and in this connection plaintiffs allege that the reason that defendant did not in the transaction of its regular business sell lumber suitable for the manufacture of box shook was because defendant had a substan-

tial investment in its box factory and therefore wished to keep it in operation at all times so as to earn interest on its investment and the overhead incident to its maintenance and the profit to be made from the process of re-manufacture carried on therein.

Plaintiffs deny every allegation of said paragraph XVIII not hereinabove expressly admitted.

12. As to the allegations of paragraph XIX: Plaintiffs admit that in making its proof of loss and in presenting its figures for the consideration of the appraisers and umpire defendant used average cost of lumber, and in this connection plaintiffs allege that such use was improper and unjustified.

Plaintiffs are without knowledge or information sufficient to form a belief as to the allegations of said paragraph XIX not hereinabove expressly admitted.

13. As to the allegations of paragraph XX: Plaintiffs admit that each of the policies of insurance contained the "Contribution Clause" as quoted in said paragraph XX; that said saw mill was destroyed by fire; and that no depreciation in fact occurred on said saw mill after it was burned and destroyed; and that the appraisers and umpire knew these facts.

Plaintiffs deny the allegations contained in the second paragraph of said paragraph XX, commencing "The phrase . . .", and ending ". . . partial

suspension of business.", and deny that any of said policies of insurance provided other than as stated in the policies themselves.

Plaintiffs are without knowledge or information sufficient to form a belief as to the remaining allegations of said paragraph XX.

Second Count of Counterclaim:

14. Plaintiffs admit the allegations contained in paragraphs I, II, III, IV, V, XIII, XIX, XX, XXI, and XXIII.

15. Plaintiffs deny the allegations contained in paragraphs VI, VII, VIII, IX, X, XI, and XII; and in this connection plaintiffs deny that any policy issued by plaintiffs provided other than as stated in the policies themselves.

16. Plaintiffs deny the allegations contained in paragraph XXIV.

17. As to the allegations of paragraph XIV: Plaintiffs admit that on the evening of July 7, 1945, a fire occurred on the premises described in each of said policies which damaged and destroyed the saw mill which was part of the property described in each of said policies, so as to necessitate a suspension of defendant's business.

Plaintiffs deny every allegation of said paragraph XIV not hereinabove expressly admitted; and in this connection, plaintiffs deny that the total of the profits prevented and fixed charges and expenses for the period of twelve months immediately suc-

ceeding the fire was an amount in excess of $954,-249.02, and for the period of nine months immediately succeeding the fire was an amount in excess of $651,739.56.

18. As to the allegations of paragraph XVI: Plaintiffs admit that said fire did not prevent defendant's logging operation nor destroy said box factory; that after said fire defendant had on hand a large amount of lumber which had been produced by running logs through defendant's saw mill, which lumber was suitable for use in said box factory for the manufacture of box shook; and that defendant, after the said fire, resumed partial operation of said property described in each policy and partial operation of its business by continuing its logging and the operation of its said box factory, and made use of said lumber suitable for the manufacture of box shook.

Plaintiffs deny every allegation of said paragraph XVI not hereinabove expressly admitted; and in this connection, plaintiffs allege that by the partial operations aforesaid, defendant earned a credit to net profits and fixed charges for the nine-month period following the fire (which net profits and fixed charges, as alleged in paragraph 17 immediately hereinabove, did not exceed the total amount of $651,739.56) in the amount of $185,479.73, and plaintiffs deny that the net loss to defendant during the nine months immediately succeeding said fire, or on account of said fire, or sustained by reason of the partial suspension of defendant's business

necessitated by the destruction and damage of defendant's property by said fire, as reduced by said partial operation, was or is in excess of $466,259.83.

19. As to the allegations of paragraph XVII: Plaintiffs deny every allegation of said paragraph XVII; and in this connection, plaintiffs deny that by reason of the facts stated in the second count of said counterclaim, or by reason of any facts whatever, the amount which defendant is entitled to recover under all of said policies is in excess of $424,117.31, and plaintiffs deny that each plaintiff became or is liable to defendant for any amount or amounts in excess of that proportion of the liability of all plaintiffs ($424,117.31) which the face amount of the policy of each plaintiff bears to $651,000.00, less payments heretofore made by each plaintiff to defendant as shown in Column "C" of Exhibit "C" attached to plaintiffs' complaint herein.

20. As to the allegations of paragraph XVIII: Plaintiffs admit the allegations of said paragraph XVIII, except as to the amount or amounts of purported "balance due" or "Balance Claimed" as shown in the last column of the tabulation contained in said paragraph XVIII.

21. As to the allegations of paragraph XXII: Plaintiffs admit the allegations of said paragraph XXII, except that plaintiffs deny that in any respect the appraisers or umpire acted otherwise than pursuant to and in accordance with the provisions

of each of said policies of insurance. In this connection, plaintiffs allege that the holding of a single appraisement and the actions of the appraisers and umpire in this regard were in all respects and at all times consented and agreed to and acquiesced in by defendant.

Wherefore, plaintiffs pray that defendant's counterclaim be dismissed with costs.

BERT W. LEVIT,

LONG & LEVIT,

By /s/ BERT W. LEVIT,
Attorneys for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed June 10, 1948.

[Title of District Court and Cause.]

AMENDMENT TO REPLY TO COUNTERCLAIM

(In Second Amended Answer)

Plaintiffs hereby amend, as of course, their reply to the counterclaim contained in defendant's second amended answer and counterclaim, as follows:

I.

Plaintiffs amend paragraph 8 of said reply, so that said paragraph 8 shall cease to read as formerly written and shall read in whole as follows:

8. As to the allegations of paragraph XIII: Plaintiffs are without knowledge or information sufficient to form a belief as to the allegations of said paragraph XIII; except that plaintiffs admit that defendant, as part and parcel of the partial operation after the fire, engaged in logging, and that the logs cut and on hand could not be promptly sawed into lumber, and that some small amount of depreciation may have occurred in said logs because of rot, stain, check, and brashness, but defendant denies that the amount of such depreciation in said logs which occurred within the nine-month period immediately following the fire was more than $36,000, or exceeded a nominal amount, and plaintiffs allege that the minor amount of depreciation that may have occurred was irrelevant because absorbed by the market conditions then and subsequently in existence and because the said continuance of logging operations by defendant resulted in defendant obtaining a surplus quantity of logs to defendant's financial benefit in an amount far in excess of any possible depreciation that may have occurred and of any extra cost of decking that may have been incurred by defendant.

Dated: San Francisco, 15 June, 1948.

BERT W. LEVIT,
LONG & LEVIT,
By /s/ BERT W. LEVIT,
Attorneys for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed June 15, 1948.

In the District Court of the United States for the Northern District of California, Southern Division

No. 27299-H

THE AMERICAN INSURANCE COMPANY, et al.,

Plaintiffs,

vs.

PICKERING LUMBER CORPORATION, a corporation,

Defendant.

Erskine, District Judge.

MEMORANDUM OPINION

In determining the issues involved herein several considerations should be borne in mind:

1. That there is no claim that the referees appointed to make the appraisal or arbitration were guilty of any fraud, actual or constructive, misconduct, bias, or partiality; or, that they did not attempt to be fair and equitable and do full justice in the task assigned to them; or that they lacked competence or sufficient qualifications to deal with the complexities involved in such task. It is clear from the record that they were well qualified and competent to undertake this work.

2. That the award made was not only joined in but advocated by the referee appointed by the defendant.

3. That the presumption is that the decision and award of the referees was correct and valid.

4. That the proof of loss filed by the defendant claimed a loss in excess of $742,000.00 and set forth numerous items, only five of which are involved in this action, none of which five exceeds 7% of the claim involved, and the total of which does not exceed 15% of the total claim.

5. That each of the parties was given a full and fair opportunity to present, and did in fact present, to such referees all the evidence, views, and arguments deemed relevant on all disputed points.

6. That not every disputed item was determined by the referees in favor of the insurers, the plaintiffs herein. While they decided against the assured on several of the disputed items in the proof of loss, which decisions the assured here claims vitiate the award, the referees at the same time decided in favor of the assured on several additional disputed items.

Bearing these considerations in mind, it is necessary to set forth the items which defendant claims were erroneously or inadequately decided by the referees, thereby vitiating the ward. These claims are as follows:

I. That the referees, in determining the profit from the box factory operations, carried on during the loss period for the purpose of reducing the loss to the extent of such profit, as required by para-

graph 10 of the policies, costed the lumber used in such operations at O.P.A. ceiling prices, and that this was an error of law and of good accounting practice. (Defendant claims that this alleged error reduced the award to which it is entitled by $73,000.00, but the evidence tends to show that the difference between the figure claimed by defendant and that reached by the referees was approximately $49,000.00, after adjustment for expense items not claimed by defendant);

II. That the referees compromised, at the sum of $25,000.00, defendant's claimed losses (a) for excessive logging cost, (b) for log depreciation, and (c) for increased cost of yard and mill operations, including decking; and

III. That in fixing the "annual value," a necessary element in the computation of recoverable loss under the policy, the referees erred in including depreciation on the destroyed saw mill for the year following its destruction, thereby reducing the award to which the defendant was entitled by the sum of approximately $8,000.00.

The basis for defendant's contention that these alleged mistakes of the referees invalidated the award is (a) that this was an appraisement and not an arbitration, (b) that as appraisers the referees could not determine questions of law or construe the terms of the policy, and (c) that in the decisions on the disputed issues they erroneously determined questions of law, erroneously construed the terms of

the policy, acted outside the scope of the submission, and failed to pass upon matters included in the submission to them.

In discussing these three disputed items I do not believe it necessary to determine whether the reference was an appraisal or an arbitration. The policies under consideration covered the actual loss sustained by the insured by reason of the total or partial suspension of business caused by fire, consisting of the net profits of the business thereby prevented and fixed charges and expenses to the extent they would have been earned had no fire occurred. These policies provided in general that the loss should be reduced by profits earned during a total or partial resumption of business.

These policies were different from the usual fire policies which cover the value of property destroyed by fire. Under the latter type of policy, it is merely the duty of appraisers or arbitrators to determine that value, which is generally purely a question of fact. Under the policies in question, if a reference were required, the referees were of necessity to determine the profits made by the partial resumption of operations and the fixed charges and expenses; if questions of accountancy or of law were implicit in or incidental to such determination it was the clear intent of the provisions for reference in said policies that the referees should make such determinations, whether they were appraisers or arbitrators.

I.

Costing Lumber Used in Box Factory Operations at O.P.A. Ceiling Prices

At the time of the fire defendant owned and operated a large lumber manufacturing plant consisting of a saw mill, planing mill, dry kilns, box factory and similar structures, and owned and operated extensive forests in connection with said plant and for the supply of logs thereto. The operations consisted of felling the trees, bringing the logs to the mill, and putting them through the saw mill, thereby producing different grades of lumber, some of which were sold, some of which were run through the box factory, and some of which were put through other processes. At the time of the fire there were on hand at the mill site milled lumber and logs. There were also felled logs in the forests. After the fire the defendant continued to fell logs, bring them in from the forest, and put them in the mill pond. When the pond was filled, any additional logs were decked. Some of the milled lumber on hand was damaged by the fire. Some of the remainder on hand was apparently processed through the box factory, and some was apparently sold as lumber. The lumber processed through the box factory consisted of 8,828,644 board feet. The source of this lumber was 11,814,000 board feet produced from the latest operations of the saw mill immediately preceding the fire and 3,619,000 board feet taken from the inventory existing on March 31, 1945. In determining

the cost of this lumber that was put through the box factory operations, the defendant computed a cost of $39.86 per M, which it describes as average or true cost; in general this was computed by taking all of the lumber from which this 8,828,644 board feet were taken and dividing it by the cost of production including administration and overhead costs allocated to its production, thereby obtaining the average cost, regardless of grade, of $39.86 per thousand board feet. The defendant contends that its entire operation was an integrated whole, and since no profit would be realized until the box shook produced by the box factory was sold, which was done, this was the only method of costing the lumber into the box factory to determine the profit realized by its operations.

The insurers contend and the referees agreed that such average cost was an improper method of costing the lumber into the box factory and did not conform to general theory and practice of accountancy. The referees agreed that the lumber should be costed into the box factory at O.P.A. ceiling prices including an adjustment for freight differential favorable to defendant, or else on what is designated as an allocated cost basis which would distribute the common costs of production among the various grades produced, in proportion to the respective market value of each grade at the point of diversion to supplemental processes.

The referees costed the lumber into the box factory at O.P.A. ceiling prices adjusted for said

freight differential. It is generally conceded that this was more favorable to the defendant than an allocated cost, if that could be determined. The defendant contends that this was an error of law and thereby rendered the award invalid.

Defendant asserts that the referees thought they must accept O.P.A. ceiling prices. There are some statements to this effect in the depositions, but taking all the evidence into account, it is clear that this thought, if in the minds of any or all of the referees, was not the motivating or actuating basis for their decision. They decided as a matter of practical and realistic accounting that the O.P.A. ceiling price was the fairest, most practical and realistic method of costing the lumber into the box factory for the purpose of determining the profit from the box factory operations.

The reasons for this action by the referees are well stated in plaintiff's exhibit "S," a letter dated March 1, 1948, from Anson Herrick to Paul Barnett, the attorney for the defendant. Herrick was the referee appointed by the defendant. This letter in part reads as follows:

"I believe your contention that the profit of the box factory after the fire should be based upon the average cost of all lumber produced is erroneous, without any foundation in accounting, and can be successful only by the application of some principle or claimed principles of law which will be wholly unrealistic and in disregard of accounting principles. . . .

"It should be obvious that an accurate profit and loss statement would not result if the beginning inventory had nothing but clears and the ending inventory had nothing but common or vice versa. Because of this the practice of cost allocation is well recognized in accounting. Under this method production cost is allocated between grades in the ratio of their value. This method has a sound basis in the principle that each piece of lumber produced should contribute to the cost of its production in ratio proportionate to its realizable value.

"Lumber, regardless of grade, constitutes a finished product and its reworking into doors or pipe or box shook becomes a supplemental operation and it is fundamental that to determine the profit from such supplemental operation the lumber consumed should be charged in at a price equal to that which could have been realized had the supplemental operation not taken place. This is a general practice among lumber and box manufacturers, the Pickering Lumber Corporation determined a box factory profit upon that basis, and I doubt that you could get any accountant to testify to the effect that that was not the generally accepted basis. It was no surprise to me to be told by the other appraiser that he had consulted three or more accountants connected with lumber operations who informed him that such was the correct basis. . . .

"Another argument which may be made carries out the argument which you have used that in the case of Pickering Lumber Corporation there was what is termed an 'Integrated operation' and that

that lumber which was intended to be used for the production of box shook should not be considered a finished product. On such a basis the problem then becomes one of assigning to the various operations their contribution to the ultimate profit. In other words, while it is true from a legal standpoint that profit is not realized until the sale is consummated, it is unrealistic, viewing the three operations of logging, milling, and box factory as merely parts of one total operation, to contend that all of the profit from the sale of box shook belongs solely to the box factory. In fact, were it not for the fact that lumber is a finished product, the recognition of this principle of the contribution of each department to the total profit is necessary of recognition in many use and occupancy settlements. For the purpose of testing this theory I did make some preliminary computations the result of which developed a loss somewhat larger than that ultimately found, but because that computation was made before a number of other determinations which would bear upon it, it would be necessary for me to completely recompute it if you were to care to use it.

"The danger of the foregoing argument is the fact that profit is not construed to be realized until sale takes place and that consequently the production of each of the departments prior to the final department should be valued at cost which in this case would not be average cost for which you argue, but allocated cost and upon such basis the lumber used by the box factory in post fire operations would

be computed as costing at least several dollars less than the O.P.A. prices which were adopted."

In the light of this reasoning it cannot be said that the course adopted by the referees was improper accounting procedure or an error in law.

This conclusion is fortified by the testimony of Rodolph, an expert accountant familiar with general accounting practice in the lumber industry and by the fact that in making a claim against the insurer of the property destroyed by fire, the defendant based its claim for the lumber destroyed on O.P.A. ceiling prices, though the average cost was available. In addition, to determine the profit from the box factory operation for management and income tax purposes, the defendant costed the lumber into the factory at O.P.A. ceiling prices.

The cases of Studley Box etc. Co. v. Insurance Co., 154 Atl. 337, Fidelity Phoenix etc. Co. v. Benedict Co., 64 F. (2d) 347, and Armour & Co. v. Bowles, 148 F. (2d) 529, relied upon by the defendant in support of its contention that the referees committed an error of law, do not support this contention, because they do not apply to the particular point under discussion. So far as I have been able to discover, neither party has cited any authority upon the exact question, to wit, is average cost, market value, or allocated cost the required or proper basis to use in the circumstances. The case of National Union Fire Ins. Co. v. Anderson Pritchard Oil Corp., 141 F. (2d) 443, cited by the plaintiffs, appears closest in point and supports the conclusion of the referees.

For the foregoing reasons I conclude that the method adopted by the referees in determining the box factory profit did not invalidate the award.

II.

Allowance of $25,000.00 to Cover Excess Logging Cost, Log Decking and Log Stain (Depreciation)

At the time of the fire defendant had felled; cut into logs and had on hand in decks 9,550,656 feet of logs. In the nine months following the fire it brought in from the forests to its millsite 11,301,877 feet of logs. Of these logs 5,456,937 feet had been cut before the fire and were lying on the ground, or in banks along side defendant's logging road, and 5,844,910 feet of them had been cut after the fire. This would indicate that at the end of said nine-months' period there was in excess of 20,000,000 feet of logs on hand for sawing operation when the sawmill was rebuilt, which was several months after the end of said nine months. For the protection of these logs during the interim defendant claims it was necessary to deck them.

Defendant claims that the excess logging cost of the 11,301,877 feet was $3.60253 per M foot, or $40,715.40; that the cost of decking, expanding its spur tracks, and other abnormal expenses to retard depreciation of these logs was $12,492.35, and that the stain and like depreciation was $36,149.95; it claims that these items should be deducted from the gross recovery by partial logging operations to determine the net amount of fixed charges and continued ex-

penses recovered by the logging operations. Defendant contends that these items were definitely fixed and ascertainable and were not a matter of estimation or judgment and that each of these items should have been definitely found by the referees. The referees allowed a lump sum of $25,000 to cover these three claimed items and another minor credit item of grazing rentals. Defendant claims that this allowance was a compromise and not a proper discharge of the submission to the referees and that they erroneously passed upon the legal question of whether these items were allowable expenses, thereby exceeding their powers because they had no jurisdiction to determine such a question.

The question of whether there was an "illegal" compromise seems to be a question of fact. There is nothing in the policies or in the reference paragraphs thereof which requires the appraisers to make specific findings respecting the adequacy or inadequacy of each of the many items in the proof of loss. The Supreme Court of California has recently held that the failure to make an express finding in the award on a particular claim does not invalidate the award.

"There is no general rule that arbitrators must find facts and give reasons for their award. In fact, the rule and general practice is to the contrary."

Sapp v. Barenfeld, L.A. 20682, Dec. 13, 1949 (reversing Sapp v. Barenfeld, 91 ACA 156, cited and relied upon by defendant), and cases cited therein.

The referees were required to decide upon the amount due the defendant under the policies, and the mere fact that they determined that $25,000 was adequate to cover these three items would not be a failure to discharge the submission nor a case of exceeding the submission.

The contention of defendant that these items had been definitely ascertained and were not a subject of estimation or judgment is not supported by the evidence. The figure of $3.6053 per M foot for excess logging cost was given by defendant's witness Momyer at the trial, but Herrick's notes of Momyer's testimony at the hearing before the referees show that Momyer conceded that the question of whether this figure of $3.6053 was excessive was an open one. At the trial Momyer admitted that Herrick's notes in this respect were adequate. The referees found that this excessive logging cost was palpably excessive and Herrick characterized it as a guess and stated "There had been no adequate evidence with respect to this." Also, in Exhibit "V" it is said "a reasonable claim (for excess logging costs) probably would not have been more than $15,000.00 to $20,000.00." The situation was similar with regard to log stain and decking. Defendant's own witness Momyer conceded that the determination of log stain would of necessity be merely an estimate. Referee Maloney states that he was not satisfied with the estimate of $36,149.95 made by defendant's experts for this item, that it was excessive, and that he did not accept it.

Apparently in determining these three items the referees also considered that labor and material costs generally had risen, that labor was more inefficient, and that these factors made the logging cost greater than in similar periods in the past, and would have occurred had there been no fire. Furthermore the appraisers seemed also to take into consideration the factor urged upon them by the insurers (Exhibit 4) that since there was approximately 15,000,000 feet more of logs on hand from these logging operations than normal production there was an accumulation of profit in such logs which was realized after the termination of the loss period.

There were many considerations which entered into the determination of the referees respecting these three items. This determination was reached by them after many lengthy conferences in which all of the considerations affecting the question were discussed. Herrick says in his letter to Barnett, Exhibit "R":

"As I told you this morning it is nearly impossible for me to recite all of the considerations during the very lengthy conferences which led to the determination (of the award) which as you know constituted a unanimous agreement."

Again in another letter to Barnett, Exhibit "S," Herrick says:

"As I have explained to you orally, in a situation such as this there is no specific amount which can be asserted to be the correct valuation and that all others are wrong but rather that there is an area

within which any amount is appropriate of designation as a fair valuation. The valuation found by the appraisers was in my opinion within that area."

After viewing all of the evidence regarding the determination of these three items I cannot conclude that it was inadequate, or that it was a "compromise wearing the dress of an award." I believe it was the result of a long, arduous and conscientious effort to arrive at a fair valuation in which all factors were considered. Thus I cannot find that it falls within the purview of St. Paul Ins. Co. v. Eldracher, 33 F. (2d) 675, or Holker v. Parker, 7 Cranch (U.S.) 436, or the other cases cited by defendant to the same effect as the two just cited. In arriving at this determination the referees may have deferred to the opinions of each other and thus reached a compromise of opinion, but such a concession and compromise is not the "illegal compromise" upon which the above cited Eldracher and Parker cases are based.

6 C.J.S. (Arbitration) Sec. 50;
Morse, Arbitration of Award 164-165.

As noted above, the case of Sapp v. Barenfeld, 91 ACA 156, relied upon by defendant, has been reversed by the Supreme Court of California. In any case, however, the facts and circumstances of the present case make inapplicable the ruling of the District Court of Appeal in the Sapp case. In that case the arbitrators did not consider or determine one of the issues submitted to them, and they failed to discharge the submission. It is con-

tended here that the appraisers did not consider or determine these three items, but the evidence is to the contrary. The testimony of Herrick, Maloney and Lilly show that they considered each of these items and that the allowance of $25,000.00 included the excess logging cost, the log stain and the log decking. For instance, Maloney testified as follows:

"Q. Then you didn't throw out excessive logging costs? A. No.

Q. Nor the log stain? A. No.

Q. Nor the log decking? A. No."

(Dep. p. 17)

To the same effect see:

Herrick deposition p. 74;

Lilly deposition p. 8.

Accordingly it cannot be said that the appraisers failed to consider or determine these three items.

Defendant argues that Herrick considered the log stain deterioration and not depreciation, and therefore refused to consider it. But the testimony of Herrick and the documentary evidence taken as a whole show that Herrick did take the log stain into account and made allowance for it.

Herrick testifies in part as follows:

"Q. All right. . . . Now, did you consider that claim?

A. That entered into the allowance of $25,000. . . . The excessive logging costs and the stain . . . and the decking."

Herrick did not consider this log stain as depreciation as that term is used in Item II, and there-

fore did not include it in calculating total insurable values for the purpose of applying the contribution clause, and in this conclusion he was confirmed by the testimony of Momyer. But it is not true that Herrick did not consider this log stain, thinking it not covered by the policies. On the contrary his testimony (including that just quoted), and his letters show that he considered it and made allowance for it in said sum of $25,000.00.

I cannot find that in this construction of the terms of the policies, or in any construction thereof made by them, Herrick and the other referees misconstrued the terms of the policies. Furthermore, as heretofore stated, the very nature of the questions to be submitted to the referees by the terms of the policies indicated that it was contemplated by and the intent of the parties that the referees should pass upon any subject that was implicit in or incidental to such determination, including questions of accountancy or law, whether they be called appraisers or arbitrators. Accordingly, if in determining these questions they were required to construe the policies or settle questions of law they were acting within the scope of the submission.

See: Patriotic Order v. Insurance Co., 157 Atl. 259;
Continental Ins. v. Titcomb, 7 F. (2d) 833;
Chandos v. Insurance Co., 54 N. W. 390.

For the foregoing reasons I conclude that the allowance of $25,000.00 for excessive logging cost, decking and log stain did not invalidate the award.

III.

Inclusion in Annual Insurable Values of Depreciation on the Burned Sawmill

By the terms of paragraph 2(A) of the policy, in case of a suspension of operations caused by fire the insurer is liable for the "actual loss sustained by reason of such suspension, consisting of:

Item I: The net profits on the business which is thereby prevented;

Item II: Fixed charges and expenses only to the extent to which they would have been earned had no fire occurred, as follows: . . . depreciation . . . and such other fixed charges and expenses which must necessarily continue during a total or partial suspension of business."

Paragraph 4, the "Contribution Clause" reads as follows:

". . . in the event of loss, this Company shall be liable for no greater proportion thereof than the amount hereby insured bears to seventy-five per cent (75%) of the total of the net profits (Item I) and charges and expenses (as specified in Item II) which would normally have been earned during the period of twelve (12) months immediately following the fire."

The combined total of the net profits and the charges and expenses "which would normally have been earned" during the year following the fire, is the so-called "annual value" or "insurable value"

which must be computed in order to apply the formula of the Contribution Clause.

The referees included in the "annual value" the sum of $15,000, constituting depreciation on the sawmill, on the theory that such depreciation was a fixed charge which would normally have been earned. The defendant, on the other hand, contends that this amount should not have been added to the "annual value" because there could be no depreciation on a destroyed sawmill, and only such fixed charges that must necessarily continue during a suspension of business should be included in the said "annual value."

As can readily be shown by carrying out the computation required by the Contribution Clause, the effect of adding $15,000 to the "annual value" is to reduce the amount of the recoverable loss; since the insurers are liable only for that proportion of the actual loss equivalent to the ratio between the amount of the insurance and the "annual" or "insurable" value, any addition to the denominator, which is the "annual value," reduces the proportion, and hence reduces the amount of the recoverable loss.

The disagreement between the parties stems basically from the difference in phraseology between paragraps 2(A) and 4. Paragraph 2(A) enumerates the items that comprise the actual loss. These items include the net profits and fixed charges which must necessarily continue during the suspension of business. In determining the actual loss, the defendant and the referees correctly excluded the item of de-

preciation on the destroyed sawmill, since this was not an item that must necessarily continue after the fire.

Paragraph 4, on the other hand, is not concerned with determining the actual loss; the purpose of paragraph 4 is to provide the formula for determining the proportion of the actual loss for which the defendant-insurers will be liable. The basic item in this formula is the "annual" or "insurable" value, which is defined as "the net profits (Item I) and charges and expenses (as specified in Item II) which would normally have been earned during the year immediately following the fire."

The defendants maintain that the term "expenses which would normally have been earned" in paragraph 4 must be limited and restricted by the term "must necessarily continue" found in paragraph 2(A), for the reason that the word "expenses" in paragraph 4 is immediately followed by the parenthetical phrase "(as specified in Item II)." I do not believe the defendant is correct in this contention. The parenthetical phrase "(as specified in Item II)" appears to have been inserted in paragraph 4 merely for the purpose of including by reference the list of specific items listed in Item II of paragraph 2(A), so as to avoid the necessity of repeating this rather long list; it was not inserted thereinfor the purpose of also including by reference the concluding phrase of paragraph 2(A) "which must necessarily continue," so as to greatly restrict the meaning of the concluding phrase of paragraph 4 "which would normally have been earned."

This conclusion is buttressed by the fact that the purpose of the Contribution Clause is to compel the assured to carry full insurance to the values at risk. This purpose could not be achieved if the amount of insurable value would vary depending upon whether all or only a portion of the property actually burns, which would result from an adoption of the defendant's theory.

Therefore, it is the conclusion of this Court that the referees were correct in including depreciation on the burned sawmill in determining the "insurable value." The cases cited by defendant are not contrary to this conclusion, since they stand only for the proposition that depreciation on destroyed property cannot be claimed by the insured as an item of actual loss; these cases did not concern the determination of "insurable value."

In the light of the foregoing facts and conclusions of law it is the opinion of this Court that the award is valid and binding upon the parties thereto, and that the amount payable by each plaintiff to defendant is the amount heretofore tendered by each plaintiff as alleged in the complaint, and as shown in column (D) of Exhibit "C" attached thereto. Judgment will be prepared and entered in accordance with this opinion.

Dated: December 23rd, 1949.

/s/ HERBERT W. ERSKINE,
U. S. District Judge.

[Endorsed]: Filed December 23, 1949.

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 27th day of December, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Herbert W. Erskine, District Judge.

[Title of Cause.]

ORDER ENTERING JUDGMENT IN FAVOR OF PLAINTIFFS, PLAINTIFFS TO HAVE UNTIL JANUARY 6, 1950, TO PREPARE AND LODGE FINDINGS OF FACT AND JUDGMENT

This case having been heretofore tried and submitted, and due consideration had thereon, it is Ordered that judgment be entered herein for the plaintiffs and against the defendant, in accordance with a memorandum opinion heretofore signed and filed. Further ordered that plaintiffs may have until January 6, 1950, within which to prepare and lodge Findings of Fact and Judgment.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial commencing on 7 June 1949, on the issue of the validity of the appraisal award as raised by the complaint and the second amended answer and by the first count of the counterclaim contained in said second amended answer and the reply thereto, before the Court sitting without a jury, said issue not being triable of right by a jury and a jury trial as to said issue having been expressly waived; and the Court having heard and considered the testimony and the proofs offered by the respective parties and the arguments of counsel, and the cause having been submitted to the Court for decision; the Court, being fully advised in the premises, now makes the following findings of fact and conclusions of law.

Findings of Fact

I.

The jurisdiction of this Court arises out of the fact that the parties hereto are citizens of different states, and the amount in controversy is in excess of $3000 exclusive of interest and costs; this is a suit brought pursuant to the Federal Declaratory Judgment Act (28 USC 400), and the case is one of actual controversy between plaintiffs and defendant; all as is more fully hereinafter found.

II.

Each of the plaintiffs is a corporation incorporated under the laws of a state of the United States other than the State of Delaware, or under the laws of a foreign country, as specifically set forth in paragraph II of the complaint herein to which reference is hereby made. Each of the plaintiffs is now and for many years past continuously has been engaged in business as an insurance underwriter in and by authority of the several states of the United States, including the State of California; the principal office of each of the plaintiffs in the State of California is located at San Francisco, California; and in the case of plaintiff Fireman's Fund Insurance Company, a California corporation, the principal office of said plaintiff is located at San Francisco, California.

III.

Defendant is a corporation incorporated under the laws of the State of Delaware. Defendant is now and for many years past continuously has been engaged in business in the State of California carrying on sawmill, box factory, and timber operations in said State of California. Defendant has, prior to the filing of the complaint herein, designated a resident of the State of California as agent for service of legal process, and several of its principal corporate and managing officers are and for some time have been residents of the State of California.

IV.

On or about 30 April 1945 each of the plaintiffs did, in California, issue and deliver to defendant its policy (or policies) of insurance known as use and occupancy or business interruption insurance, insuring defendant against actual loss sustained by reason of suspension of business resulting from damage by fire to certain properties of defendant located in the State of California, for a term of one year from and after 30 April 1945, and on the provisions of and subject to the terms and conditions contained in said policies of insurance. A copy of the policy of insurance so issued by plaintiff The Home Insurance Company is attached hereto, marked Exhibit "A" and Exhibit "B," and made a part hereof; each of the policies issued by plaintiffs is substantially identical in form and substance to the said policy issued by plaintiff The Home Insurance Company. The identifying number of and the amount of insurance provided for (as of 7 July 1945) in each of the policies so issued by plaintiffs is as shown in the first three columns of Exhibit "C" attached hereto and made a part hereof, the amount of insurance so provided being as shown in Column (A) of said Exhibit "C." The total amount of insurance provided for (as of 7 July 1945) in and by all of said policies in the aggregate is the sum of $651,000. At the time of the fire hereinafter referred to, defendant carried no use and occupancy or business interruption insurance other than or in addition to the said policies issued by plaintiffs.

V.

On 7 July 1945 a fire damaged the properties referred to in said policies, and caused a suspension of business by and a loss to defendant.

VI.

On or about 22 March 1946 at the request of defendant, plaintiffs and each of them made an advance payment to defendant on account of said fire and loss pending ascertainment of the amount of said loss. Said advance payment was in the aggregate amount of $250,000, and the amount paid by each plaintiff to defendant is as shown in Column (C) of Exhibit "C" attached hereto.

VII.

From time to time following said fire, at the request of defendant, plaintiffs extended the time for filing proofs of loss under said policies of insurance; within the time as so extended and on or about 24 January 1947 defendant made and delivered to plaintiffs its proof of loss in the form of a document entitled "Final Proof of Loss" directed to each and all of plaintiffs. In said document defendant made claim against plaintiffs for an alleged loss in the total amount of $742,004.41; and defendant therein demanded payment from each plaintiff of an amount equal to the face amount of its respective policy (or policies) as shown in Column (A) of Exhibit "C," plus interest, less the amount of the advance payment made to defendant

by each plaintiff as found in paragraph VI hereinabove and as shown in Column (C) of Exhibit "C." The amount so demanded by defendant from each plaintiff, even after deduction of the advance payment made by each, and exclusive of interest and costs, was and is in excess of the sum of $3000 as to each plaintiff.

VIII.

On or about 27 January 1947 and within the time provided by said policies of insurance plaintiffs notified defendant in writing that the said proof of loss was defective in the particulars specified in the notice and requested that the defects be remedied by verified amendments. On or about 6 February 1947 defendant made and delivered to plaintiffs its reply to said notice in the form of a document entitled "Reply Affidavit."

IX.

On or about 10 February 1947 and within the time provided by said policies of insurance, plaintiffs notified defendant in writing of their total disagreement with the amount of loss claimed by defendant and of the amount of loss plaintiffs admitted, all in accordance with the provisions of said policies of insurance.

X.

Plaintiffs and defendant failed to agree within 10 days after said notice of disagreement, as to the value of the subject of insurance and the amount

of loss. On or about 21 February 1947 and within the time provided by said policies of insurance plaintiffs demanded in writing an appraisement and named a competent and disinterested appraiser. Defendant thereupon appointed a competent and disinterested appraiser. The two appraisers so chosen, before commencing the appraisement, selected a competent and disinterested umpire.

XI.

Thereafter the appraisers and umpire entered upon said appraisement pursuant to the provisions of said policies of insurance. On or about 18 April 1947 the referees requested plaintiffs and defendant to extend until 3 May 1947 the time for completion of the appraisement, and plaintiffs and defendant consented in writing to such extension of time. By written award dated 1 May 1947 duly signed and verified by the two appraisers and by the umpire the values and loss were estimated, ascertained, and appraised, and the sound value and damage were separately stated, all in accordance with the provisions of the said policies of insurance, as follows:

(1) The net profits prevented and fixed charges and continuing expenses during the period from 8 July 1945 to 7 April 1946, reduced by profits realized and fixed charges and continuing expenses recovered by partial operation following the fire, were fixed at the amount of $581,000;

(2) The net profits prevented and charges and expenses which would normally have been earned

during the period of 12 months immediately following the fire were fixed at the amount of $1,030,000;

(3) The expenses incurred by defendant, other than those constituting costs of partial operations, for the purpose of reducing the loss, were fixed at the amount of $1,760.

XII.

By application of the provisions of said policies to the said ascertainment by appraisal award, the aggregate amount payable to defendant by plaintiffs pursuant to the provisions of said policies was and is the sum of $491,379.41; and the amount payable by each plaintiff under and by virtue of said ascertainment and said provisions is that proportion of $491,379.41 which the face amount of each of said policies bears to the aggregate face amount of all of said policies, as shown in Column (B) of Exhibit "C."

XIII.

Between on or about 26 and 28 May 1947 and within the time provided by said policies a number of the plaintiffs tendered to defendant the full amounts payable by each of them respectively under said award as shown in Column (B) of Exhibit "C," less the amount of the advance payment theretofore made by each such plaintiff, the amount so tendered by each such plaintiff being as shown in Column (D) of Exhibit "C." Thereafter and between on or about 29 and 31 May 1947 defendant

rejected, refused, and returned each and every such tender made by plaintiffs as aforesaid; and at the same time defendant advised all plaintiffs, including those who had not yet made any tender, that defendant would not accept payment from any of plaintiffs under said award, that defendant intended to dispute the validity of said award and would not concede or accept its validity, and that defendant claimed to be entitled to receive from each plaintiff an amount equal to the face amount of its respective policy (or policies), and from all plaintiffs in the aggregate the sum of $651,000, all as shown in Column (A) of Exhibit "C," plus interest, less the amount of the advance payments theretofore made by plaintiffs as found in paragraph VI hereinabove and as shown in Column (C) of Exhibit "C." Each of the plaintiffs was at all times from and after rendition of the said award ready, able, and willing to make payment to defendant under said award, and would have done so within the time provided by said policies of insurance had defendant not rejected the tenders made as aforesaid and had defendant not notified plaintiffs that it would reject all further tenders as aforesaid; any further tender made by or on behalf of any plaintiff under these circumstances would have been a vain and useless act and would have been rejected and returned by defendant.

XIV.

The amounts so tendered by some of the plaintiffs and the amounts that would have been tendered

by all the plaintiffs, as found in paragraph XIII hereinabove, were and are as shown in Column (D) of Exhibit "C," and were and are as to each plaintiff individually and as to all plaintiffs in the aggregate the full amounts to which defendant was and is entitled under and by virtue of the said policies of insurance. The said appraisal award, by virtue of which the said amounts were determined as aforesaid, was and is valid and binding on both plaintiffs and defendant.

XV.

At the time of the fire defendant owned and operated a large lumber manufacturing plant consisting of a sawmill, planing mill, dry kilns, box factory and similar structures, and owned and operated extensive forests in connection with said plant and for the supply of logs thereto. The operations consisted of felling the trees, bringing the logs to the mill, and putting them through the sawmill, thereby producing different grades of lumber, some of which were sold, some of which were run through the box factory, and some of which were put through other processes.

XVI.

The fire destroyed the sawmill and thereby caused a complete suspension of business by defendant for a few days and a complete suspension of the operation of the sawmill for more than one year. At the time of the fire defendant had on hand a large amount of lumber which it had procured by run-

ning its logs through its sawmill and which lumber was suitable for being used in said box factory for the manufacture of box shook. Defendant cut additional logs after the fire and hauled these, as well as the logs already cut prior to the fire, to the plant site; there the logs were decked; the decking occasioned expense to defendant and did arrest deterioration, decay, check, and depreciation of the logs. Defendant resumed partial operation by operating its box factory until it had used all the supply of lumber suitable for the manufacture of box shook.

XVII.

In all respects the referees acted pursuant to and in accordance with the provisions of said policies of insurance. It was the clear intent of said policies and it was contemplated by and was the intent of plaintiffs and defendant that the referees should pass upon and determine any subject that was implicit in or incidental to the determination of the questions submitted to the referees, including questions of accountancy or law, and to do so with finality. The referees decided no question or subject that they were not empowered to decide or that they were not required to decide in order to arrive at an award under the said policies; at no time and on no subject did the referees act otherwise than within the scope of the submission. The referees were not required to, nor was it the intent of the policies or the parties that referees should, make specific or express findings respecting the adequacy

or inadequacy of each of the many items that made up defendant's claim. None of the five items as to which defendant contends that the referees erred exceeds 7% of the total claim, and all five together do not exceed 15% of it. The referees did not determine all of the disputed items in favor of plaintiffs; some were decided in favor of defendant and some in favor of plaintiffs.

All of the procedure followed and acts done by the referees in the course of the appraisal were consented to and acquiesced in by defendant as well as by plaintiffs. Hearings were held by the referees upon notice to all parties; plaintiffs and defendant alike were given a full and fair opportunity to present and each did in fact present to the referees all evidence, views, and arguments deemed by either to be relevant on all disputed points. No fact, point, or argument was presented at the trial of this cause by defendant that was not also presented to and urged upon the referees during the appraisal. Plaintiffs and defendant agreed that the referees need not confine themselves to information received at the hearings, but might inform themselves in any legitimate manner and from any legitimate source they saw fit; this the referees did, and they were not guilty of impropriety or misconduct in so doing.

The award was the unanimous decision of both appraisers and of the umpire; the appraiser appointed by defendant not only joined in it but advocated it. The decision and award is correct

and valid. The appraisers and umpire, singly and collectively, were guilty of no fraud, either actual or constructive, nor of misconduct, bias, or partiality; they attempted to be and were in fact fair and equitable in the performance of their duties as referees and at all times attempted to do full justice between the parties; they were well qualified and competent to undertake the appraisal.

XVIII.

Said award is valid and binding upon both plaintiffs and defendant. It is not true that the referees mistook or exceeded their authority, or misconceived their duties; nor did they commit or act upon fundamental or gross or any errors, either of law or of fact, nor make their calculations upon unlawful or erroneous bases; nor did they wholly or partially omit to consider or allow for any item of loss which was suffered by defendant and covered or insured by each or all or any of said policies. It is true that the referees undertook to construe certain provisions of said policies; in each instance where they did so, however, it was necessary that they do so in order to arrive at an award, and such construction of the policies by the referees was implicit in and incidental to the determination of the questions submitted to them for decision and award; it was the clear intent of said policies and it was contemplated by and was the intent of plaintiffs and defendant that the referees should pass upon and determine with finality any question of the con-

struction of the policies implicit in or incidental to the making of an award; the referees did not act otherwise than within the scope of the submission in so construing the policies. It is not true that the referees misconstrued the policies; in each instance where the referees undertook to construe the policies, they construed the policies correctly and in accordance with the intent of the parties and the language used.

XIX.

Pursuant to the provisions of the said policies the referees undertook to and did fix and ascertain the amount of profit made and realized by defendant by the partial operation of its plant and business during the nine-month period immediately following the fire, and deducted the amount so found from the net profits prevented and fixed charges and continuing expenses found by said referees. It is not true that in making said calculation the referees acted wrongfully, erroneously, contrary to any provision of said policies, or contrary to law, or that they arbitrarily or at all separated the partial operation of defendant's plant and business succeeding the fire or treated the same as two separate, distinct, or unrelated partial operations; nor did they treat the operation of the box factory as separate and distinct from the logging operation, nor fix the amount of profit resulting from the operation of the box factory considered as a separate and distinct operation and business.

It is true that defendant as part and parcel of

the partial operation after the fire engaged in logging, and that the logs cut and on hand could not be promptly sawed into lumber, and that some depreciation occurred in said logs because of rot, stain, check, and brashness. It is not true that the amount of depreciation which occurred in said logs within the nine-month period immediately following the fire was more than $36,000, or was more than the amount allowed therefor by the referees, as is more fully found hereinafter. It is not true that the referees did not question the amount of such depreciation; they considered the amount claimed therefor to be excessive and determined that the amount thereof was a different and substantially lesser sum than that claimed by defendant. It is not true that the referees wrongfully, erroneously, mistakenly, or contrary to law, or otherwise or at all, failed to allow for the amount of such depreciation, or failed to treat it as a part of the expense of partial operation after the fire; or that they wrongfully, erroneously, or mistakenly, or at all, failed to treat the said loss of worth in said logs as covered by said policies. It is not true that in this or any other connection the referees misconstrued their authority or duty, or that they committed grave, gross, fundamental, or any errors of either law or fact. It is true that the appraiser appointed by defendant did not consider this item to be depreciation as that term is used in Item II of the said policies, and in reaching this conclusion

said appraiser correctly construed the said policies. It is not true that this appraiser or the referees did not consider this item of depreciation, or treated it as not covered by said policies. The referees did consider this item of depreciation in the logs and did make an allowance therefor in a fair and reasonable amount, as is more fully found hereinafter.

XX.

One of the effects of the fire was to cripple and reduce the efficiency of defendant's plant, and as a result it was more expensive for defendant to continue partial operation after the fire. Defendant claimed that the additional expenses for logging amounted to more than $42,000. It is not true that the said claimed additional expenses were not estimated but were actually incurred and the actual amount thereof correctly entered upon defendant's books; nor is it true that the correctness of defendant's books in this connection was not disputed or questioned by the referees, or that they made no finding that said excessive logging cost was in any different or smaller amount; nor is it true that the referees failed to make any allowance on account of said claimed excessive cost of logging. The referees did consider this item of claimed additional expenses and determined that the amount thereof was a different and substantially lesser sum than that claimed by defendant, and the referees found and determined that the amount claimed for this item was palpably excessive and was merely a guess

or estimate by defendant; the referees did make an allowance for this item in a fair and reasonable amount, as is more fully found hereinafter. It is not true that in this or any other connection the referees misconceived their powers or duties, or that they committed a gross or any error of either law or fact.

XXI.

Defendant claimed that it was put to extra expense in its mill and yard operation because of the crippled and inefficient condition of its plant after the fire in the sum of more than $15,500. It is not true that all of this claimed extra expense was actually incurred and correctly entered upon defendant's books; nor is it true that the correctness of defendant's books in this connection was not disputed or questioned by the referees, or that they made no finding that said extra expense was in any different or lesser amount; nor is it true that the referees failed to make any allowance on account of said claimed extra expense. The referees did consider this item of claimed extra expense and determined that the amount thereof was a different and substantially lesser sum than that claimed by defendant; the referees did make an allowance for this item in a fair and reasonable amount, as is more fully found hereinafter. It is not true that the referees failed to treat the said item of extra expense as covered by the said policies. It is not true that in this or any other connection the referees

acted wrongfully, or committed a gross or any error, or failed to make a proper allowance therefor.

XXII.

It is not true that the referees committed any error in connection with any of the items of claim referred to in these findings or in connection with any other item of defendant's claim; nor is it true that the referees committed any error in the calculations or findings made by them concerning actual income or outgo after the fire, or in any other calculation or finding made by them. It is not true that the items of claim referred to in paragraphs XIX, XX, and XXI of these findings were not matters of estimation by defendant; nor is it true that all or any of them had to do with matters which actually occurred, the amounts of which had been definitely ascertained and correctly entered upon defendant's books. All and each of said items were mere matters of guess or estimation by defendant as to which the evidence before the referees was conflicting, and as to which the referees determined that the defendant's books and figures were inaccurate and insufficient to establish the amounts claimed. It is not true that the referees exceeded their authority in construing terms of the said policies, or otherwise exceeded their authority, either with respect to these items or any of them, or with respect to any other matter involved in the appraisal. In all respects the referees correctly construed the said policies. They were required to

construe said policies in order to determine the questions submitted for their decision, and this was contemplated by the terms of the policies and was the intent of the parties. In the determination of these questions and in the construction of the policies the referees acted at all times within the scope of the submission.

XXIII.

With respect to each and all of the matters or items of claim referred to in paragraphs XIX, XX, and XXI of these findings, it is not true that the referees failed to agree as to whether they should or should not be allowed as items of loss or damage to defendant, or that they disagreed as to whether the same were within the terms of the policies. The referees considered each and all of these matters and items, made determinations with respect thereto, and allowed the sum of $25,000 on account thereof. It is not true that this amount was inadequate, or the result of a compromise agreement. It was the result of a long, arduous, and conscientious effort by the referees to arrive at a fair valuation, in which all factors were considered by them. It is not true that the said allowance of $25,000 on account of these items did not represent the judgment or finding of the referees concerning the amount of said items, or was an amount on which the said referees agreed by compromise or as to which they made or entered into a compromise agreement. It is not true that in considering these items and determining that the allowance therefor should be in the amount

of $25,000, the appraisers exceeded their authority or committed a gross or any error, or that in so doing they failed to consider or determine one or more of the issues submitted to them or failed to discharge the submission. It is not true that the referees held that to be a profit which was not a profit, or erroneously or otherwise treated the logging operation as no part of the partial operation after the fire, or construed the partial operation after the fire as two separate or distinct operations, or refused to treat expenses incident to logging or operation of the mill and yard after the fire as a part of the expense of partial operation after the fire, or wrongfully or otherwise construed the loss in worth of the logs after the fire as not being depreciation or continuing expense within the meaning of the policies or as not within the coverage of the policies or as not a reduction of the amount of profit realized by partial operation after the fire.

XXIV.

It is not true that the referees, in calculating the amount of profit made by the operation of the box factory after the fire acted wrongfully, erroneously, mistakenly, or contrary to law; nor is it true that they wrongfully, erroneously, or mistakenly construed Section 10 or any other provision of the said policies, or exceeded their authority, or committed grave, gross, fundamental, or any mistakes of either law or fact. Defendant computed the cost of the lumber put through the box factory opera-

tion at an average cost of all lumber produced by defendant, both that which was and that which was not used for the manufacture of box shook, regardless of grade. The referees did not find that defendant had incorrectly computed such average cost, but they did find that such average cost was an improper method of costing the lumber into the box factory and did not conform to the general theory and practice of accountancy. The referees agreed and determined that the lumber should be costed into the box factory at OPA ceiling prices with an adjustment for freight differential favorable to defendant, and that in lieu of this method the lumber would have to be costed upon an allocated cost basis less favorable to defendant than the basis adopted by the referees. It is not true that the referees utilized OPA prices in this connection because they thought it was legally necessary for them to accept OPA ceiling prices; nor was this the motivating or actuating basis for their decision. The referees made this decision correctly, and as a matter of practical and realistic accounting, and as the fairest, most practical, and most realistic method of costing the lumber into the box factory for the purpose of determining the profit from the box factory operations. The use of average cost contended for by defendant would have been improper, erroneous, unrealistic and in disregard of accounting principles of cost allocation. The method adopted by the referees was based upon proper accounting procedure and was correct both in fact

and in law; it was in accordance with the general practices of the lumber industry and of the defendant itself. The method adopted by the referees was fair and reasonable, and resulted in a proper, adequate, and fair determination of the amount of profit made by defendant from the operation of the box factory after the fire. Determination by the referees of the method to be used in costing the lumber into the box factory was incidental to and implicit in and necessary for the computation of the profit made from the box factory operation; in making such determination the referees acted within the scope of the submission, and did not make any error either of fact or of law.

XXV.

It is not true that the phrase "charges and expenses" appearing in Section 4 of said policies (see Exhibit "B") refers only to fixed charges and expenses which must necessarily continue during a total or partial suspension of business. Said phrase refers to all charges and expenses which would occur during a normal year. It is true that the referees in arriving at the charges and expenses which would normally have been earned during the period of twelve months immediately following the fire included in said amount the sum of $15,042 which was the amount the referees determined would have been the depreciation on the destroyed sawmill in the year following the date when the fire occurred had no fire occurred. It is true that

the referees allowed nothing by way of damage on account of any part of said depreciation on the sawmill as a fixed charge or continuing expense. It is true that the appraisers construed said Section 4 to require them to include said depreciation in said twelve month period, notwithstanding the fact that no depreciation whatsoever occurred upon said sawmill following the fire. It is not true that the appraisers thereby misconstrued the said policies, or exceeded their authority or committed a gross or any error of law or of fact. The referees were correct in including the item of depreciation on the burned sawmill in determining the insurable values for the purposes of said Section 4.

XXVI.

It is not true that the referees made or that the award contains fundamental, gross, palpable, or any errors of law or of fact; nor is it true that the referees exceeded their authority in construing terms of the said policies, or exceeded the submission; nor is it true that the referees misconstrued the said policies; nor is it true that the referees entered into a compromise agreement. It is not true that the award does not allow for all proper items of loss. The award is fair and adequate and does allow for all proper items of loss in a fair, adequate, and reasonable amount. It is not true that the said award is invalid or void.

Conclusions of Law

I.

The said appraisal award is valid and binding upon the parties hereto.

II.

The amount payable by each plaintiff to defendant is as shown in Column (D) of Exhibit "C" attached hereto, without interest.

III.

Defendant is entitled to take nothing by reason of its second amended answer and counterclaim herein, including both counts of said counterclaim.

IV.

Plaintiffs are entitled to judgment against defendant as prayed in the first paragraph of the prayer of their complaint herein, and for their costs of suit herein incurred.

Let judgment be entered accordingly.

Dated: San Francisco, January 16, 1950.

/s/ HUBERT W. ERSKINE,
District Judge.

[Exhibits A, B and C referred to above are identical to Exhibits A, B and C, attached to Complaint set out at pages 16 to 48.]

Lodged January 6, 1950.

[Endorsed]: Filed January 16, 1950.

In the District Court of the United States for the Northern District of California, Southern Division

No. 27299 E

THE AMERICAN INSURANCE COMPANY, et al.,

Plaintiffs,

vs.

PICKERING LUMBER CORPORATION, a corporation,

Defendant.

JUDGMENT ON FINDINGS

This cause having come on regularly for trial commencing on 7 June 1949, on the issue of the validity of the appraisal award as raised by the complaint and the second amended answer and by the first count of the counterclaim contained in said second amended answer and the reply thereto, before the Court sitting without a jury, said issue not being triable of right by a jury and a jury trial as to said issue having been expressly waived; Messrs. Bert W. Levit and Long & Levit appearing as attorneys for plaintiffs, and Messrs. Harold C. Brown and Watson, Ess, Whittaker, Marshall & Enggas appearing as attorneys for defendant; and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause having been submitted to the Court for consideration and decision; and the Court, after due

deliberation, having rendered its decision and filed its findings of fact and conclusions of law;

Now, Therefore, by virtue of the law and by reason of the findings and conclusions aforesaid, It Is Ordered, Adjudged, Decreed, Determined, and Declared as follows:

1. That the appraisal award dated 1 May 1947, rendered under and pursuant to the provisions of certain policies of fire insurance issued by plaintiffs, respectively, to defendant on or about 30 April 1945, is valid and binding upon plaintiffs and defendant;

2. That defendant is entitled to take nothing by reason of its second amended answer and counterclaim herein, including both counts of said counterclaim;

3. That plaintiffs, severally and respectively, pay to defendant the sums hereinafter set forth:

Plaintiff	Amount
The American Insurance Company	$ 1,853.92
Atlas Assurance Company Limited	7,415.65
Caledonian Insurance Company	14,367.82
The Camden Fire Insurance Association	6,488.69
Columbia Insurance Company of New York	2,966.26
Commercial Union Assurance Company, Limited	9,269.57
The Continental Insurance Company	9,269.57
Fire Association of Philadelphia	3,707.82

Fireman's Fund Insurance Company....	6,303.30
Firemen's Insurance Company of Newark, New Jersey	5,561.74
Glens Falls Insurance Company.....	14,831.30
Globe and Rutgers Fire Insurance Company	1,853.92
Great American Insurance Company....	7,508.34
The Hanover Fire Insurance Company..	3,707.82
Hartford Fire Insurance Company.....	3,707.82
The Home Insurance Company.....	5,561.74
Insurance Company of North America...	2,780.87
Insurance Company of North America...	5,561.74
National Fire Insurance Company of Hartford	12,096.78
National Liberty Insurance Company of America	6,229.15
National Union Fire Insurance Company of Pittsburgh, Pa.....	5,561.74
New Hampshire Fire Insurance Company	11,123.47
New York Underwriters Insurance Company	7,415.65
New Zealand Insurance Company, Limited	9,269.57
The Northern Assurance Company Limited	11,911.39
Norwich Union Fire Insurance Society Limited	4,634.78
Pearl Assurance Company, Limited.....	3,707.82
The Pennsylvania Fire Insurance Company	5,561.74

Queen Insurance Company of America..	12,143.12
St. Paul Fire & Marine Insurance Company	1,853.91
Scottish Union and National Insurance Company	1,853.91
Security Insurance Company, of New Haven	9,269.57
Springfield Fire and Marine Insurance Company	3,707.82
The Travelers Fire Insurance Company..	6,488.69
United States Fire Insurance Company..	7,489.80
Westchester Fire Insurance Company...	5,561.74
The Western Assurance Company.....	2,780.87

4. That plaintiffs recover their costs of suit herein incurred, taxed at $.....

Done in Open Court, January 16, 1950.

/s/ HUBERT W. ERSKINE,
District Judge.

Dated January 12, 1950.

Approved as to form.
/s/ HAROLD C. BROWN.

Entered in Civil Docket Jan. 16, 1950.

Lodged January 6, 1950.

[Endorsed]: Filed January 16, 1950.

In the District Court of the United States for the Northern District of California, Southern Division.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Pickering Lumber Corporation, a corporation, the defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on January 16, 1950.

/s/ HAROLD C. BROWN,
/s/ HENRY N. ESS,
/s/ CHARLES E. WHITTAKER,

Attorneys for Appellant Pickering Lumber Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed January 30, 1950.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents, That Pickering Lumber Corporation, a Delaware corporation, having an office and place of business in the City of Standard, County of Tuolumne and State of California, as Principal, and Pacific Indemnity Company, an insurance corporation authorized to do and transact business in the State of California, as Surety, are held and firmly bound unto the plaintiffs, appellees, in the above-captioned cause in the sum of Two Hundred Fifty Dollars ($250.00), for the payment to them of which, well and truly to be made, we hereby bind ourselves, our successors and assigns, firmly by these presents:

Whereas, on the 16th day of January, 1950, a judgment was entered in the above entitled proceeding;

And the appellant, Pickering Lumber Corporation, feeling aggrieved thereby, appeals to the United States Court of Appeals for the Ninth Circuit.

Now, Therefore, the condition of this obligation is such, that if the aforesaid judgment is affirmed or modified by the appellate court, or if the appeal is dismissed, and the appellant, Pickering Lumber Corporation, shall pay all costs which may be awarded against it on said appeal, then this Bond

shall cease and terminate, otherwise to be and remain in full force and effect.

In Witness Whereof, this Bond is executed, this 30th day of January, 1950.

PICKERING LUMBER CORPORATION, a Corporation,

/s/ By B. JOHNSON,
Chairman of the Board.
Principal.

PACIFIC INDEMNITY COMPANY,

[Seal] By /s/ B. T. KENNEY,
Its Attorney-in-Fact.
Surety.

[Endorsed]: Filed January 30, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the Above Court:

Pickering Lumber Corporation, the defendant, and now appellant, in the above cause, hereby designates the following as those portions of the record, proceedings and evidence to be contained in the record on appeal of this cause to the United States Court of Appeals for the Ninth Circuit;

1. Plaintiffs' "Complaint for Declaratory Relief," omitting exhibits "A," "B" and "C" attached thereto (because they were admitted in evidence as plaintiffs' exhibits "A," "B" and "C").

2. Defendant's "Second Amended Answer and Counterclaim."

3. Plaintiffs' "Reply to Counterclaim (in Second Amended Answer)."

4. Plaintiffs' "Amendment to Reply to Counterclaim (in Second Amended Answer)."

5. The Complete Reporter's transcript of the evidence taken at the trial of this cause, omitting the closing arguments of counsel.

6. The Deposition of Anson Herrick.

7. The Deposition of Frank Maloney.

8. The Deposition of Lewis Lilly.

9. All exhibits offered and admitted in evidence at the trial of this cause, consisting of:

(1) Plaintiffs' exhibit "A,"—printed Policy of Insurance.

(2) Plaintiffs' exhibit "B,"—mimeographed attachment or endorsement to printed Policy of Insurance.

(3) Plaintiffs' exhibit "C,"—columnar tabulation showing numbers, names of issuing companies, amounts of policies, etc.

(4) Plaintiffs' exhibit "D,"—the Proof of Loss.

(5) Plaintiffs' exhibit "E,"—the Reply Affidavit.

(6) Plaintiffs' exhibit "F,"—the "Award and other findings of the appraisers."

(7) Plaintiffs' exhibit "G,"—letter of Paul Barnett to K. W. Withers, of May 26, 1947.

(8) Plaintiffs' exhibit "H,"—letter of Cosgrove & Company to Firemens Fund Insurance Company, of May 29, 1947.

(9) Defendant's exhibit "1,"—the Moffett report of log depreciation.

(10) Defendant's exhibit "2,"—the Thomas report of log depreciation.

(11) Defendant's exhibit "3,"—"Memorandum to Appraisers" by K. W. Withers and W. N. Ball.

(12) Plaintiffs' exhibit "I,"—letter of Momyer to Fire Companies Adjustment Bureau, of October 10, 1945, and attached sheets.

(13) Plaintiffs' exhibit "J,"—letter of Momyer to Fire Companies Adjustment Bureau, of October 11, 1945, and attached sheets.

(14) Plaintiffs' exhibit "K,"—letter of Momyer to Withers, of July 1, 1946.

(15) Plaintiffs' exhibit "L,"—letter of Robinson Nowell & Company to Withers, of August 14, 1946.

(16) Plaintiffs' exhibit "M,"—Audit Report.

(17) Plaintiffs' exhibit "N,"—letter by Momyer and Johnson to Mr. Frank Maloney and Mr. Anson Herrick, of February 28, 1947.

(18) Plaintiffs' exhibit "O,"—letter of Mr. Frank Maloney to Pickering Lumber Corporation, of March 4, 1947.

(19) Plaintiffs' exhibit "P,"—letter of Mr. Anson Herrick to Pickering Lumber Corporation, of March 21, 1947.

(20) Plaintiffs' exhibit "Q,"—letter of Mr. Anson Herrick to Insurance Companies, of March 21, 1947.

(21) Defendant's exhibit "4,"—letter of Withers to Maloney and Herrick, of April 4, 1947 (Exhibit 1 in Deposition of Anson Herrick).

(22) Defendant's exhibit "5,"—the Baker report (Exhibit 3 in Deposition of Anson Herrick).

(23) Defendant's exhibit "6,"—brief filed with Appraisers by Pickering (Exhibit 4 in Deposition of Anson Herrick).

(24 Defendant's exhibit "7,"—a computation (Exhibit 7 in Deposition of Anson Herrick).

(25) Plaintiffs' exhibit "R,"—letter from Herrick to Barnett, of May 14, 1947 (Exhibit "A" in Deposition of Anson Herrick).

(26) Plaintiffs' exhibit "S,"—letter from Her-

rick to Barnett, of March 1, 1948 (Exhibit "B" in Deposition of Anson Herrick).

(27) Plaintiffs' exhibit "T,"—"Notes relating to hearing of the matter by the Appraisers," being page 115 and following of the Deposition of Anson Herrick.

(28) Plaintiffs' exhibit "U,"—"Draft Memorandum of procedures" (Exhibit "D" attached to Deposition of Anson Herrick).

(29) Plaintiffs' exhibit "V,"—Memorandum of Anson Herrick, of May 2, 1947 (Exhibit "E" attached to Deposition of Anson Herrick).

(30) Plaintiffs' exhibit "W,"—Summary of differences by Anson Herrick (Exhibit "F" attached to Deposition of Anson Herrick).

10. Defendant's Requested Findings of Fact and Conclusions of Law, filed with the court at the conclusion of the evidence, on June 10, 1949.

11. The Opinion of the court, filed December 23, 1949.

12. The Journal Entry made by the clerk, giving plaintiffs until January 6, 1950, to prepare and lodge findings and judgment.

13. The Findings of Fact and Conclusions of Law adopted and entered by the court, together with the direction for the entry of judgment thereon.

14. The Judgment, entered January 16, 1950.

15. Notice of Appeal, with date of filing.

16. Bond on Appeal, with date of filing.

17. This Designation of Contents of Record on Appeal.

/s/ HAROLD C. BROWN,

/s/ HENRY N. ESS,

/s/ CHARLES E. WHITTAKER,
Attorneys for Defendant-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed January 30, 1950.

In the District Court of the United States for the Northern District of California, Southern Division

No. 27299-E

AMERICAN INSURANCE COMPANY, et al.,
Plaintiffs,

vs.

PICKERING LUMBER COMPANY,
Defendant.

Before: Hon. Herbert W. Erskine,
Judge.

Appearances:
BERT LEVIT, ESQ.,
For the Plaintiff.

CHARLES E. WHITTAKER, ESQ.,
HAROLD C. BROWN, ESQ.,
For the Defendant.

REPORTER'S TRANSCRIPT

Tuesday, June 7, 1949

The Clerk: American Insurance Company versus Pickering Lumber Company.

Mr. Levitt: Ready for the plaintiff.

Mr. Whitacker: Ready for the defendant.

Mr. Levitt: May it please the Court, the plaintiff's case will be very brief, and if agreeable I will present it by merely reviewing the allegations of the Complaint, most of which are admitted. There

will be one or two documents I will introduce into evidence, I think without the necessity of any identification, as I go along.

I would prefer to reserve any Opening Statement that may be necessary until just a little later, except to say at this time, as I said at the pre-trial, that the suit is in the form of a Declaratory Judgment Suit, brought by the Insurance Company to sustain the validity of the award and establish their liability to the defendant, who has refused to accept the amount of the award.

Counsel and I have entered into an informal understanding to the effect that notice to the produced documents will not be required on either side. I assume that will go to the point that in the normal course of events, objections will not be taken to the documents, merely because of copies rather than the original.

Mr. Whitacker: That is correct.

Mr. Levitt: The first paragraph of the Complaint is to the jurisdictional facts, which are admitted.

The second paragraph sets forth, states the incorporation of each of the plaintiffs and alleges that each of the plaintiffs are engaged in the business of insurance in the United States, with principal offices located in San Francisco, and that is admitted.

Paragraph three alleges the defendant is a corporation engaged in business in California, with residing officers here; that is admitted.

Paragraph four alleges——

Mr. Whitacker (Interrupting): Pardon me, Mr. Levitt, you say that is admitted—that is, the Answer is admitted?

Mr. Levitt: Yes, referring to the allegations of the Answer.

Paragraph four alleges the issuance of the policies of insurance that are involved in this action by the various plaintiffs. Exhibit A and B, attached to the Complaint, show the terms of the policies, and allege all policies were identical in form *an* substance to those Exhibits. We now, at this time, would like to offer in evidence, as Plaintiff's Exhibit A, the Exhibit A attached to the Complaint, and Plaintiff's Exhibit B, the balance of the policy form, which is attached to the Complaint.

Mr. Whitacker: There is no objection, your Honor.

The Court: So ordered, Exhibit A is admitted, and [2*] Exhibit B is admitted in evidence.

Mr. Levitt: I may pause for just a moment, your Honor, to say that the policies, as Exhibit A will show, are in the California standard statutory form, and Exhibit A is merely one of those policies, typed out as an example, with the accepted difference in that amount attached to that form was a special endorsement relating to the particular coverage granted in this case. That is embodied in Exhibit B, all the policies with the same consistency, both Exhibit A and B appear. The Complaint

*** Page numbering appearing at top of page of original Reporter's Transcript of Record.**

then lists each policy by number and company and the amount—and the total amount of insurance is stated. It also alleges that this was all the business interruption insurance by the plaintiff; this allegation is admitted by the Answer.

Paragraph five of the Complaint alleges that on July 7, 1945, a fire occurred and damage to the property referred to in the policy, and causing a loss, which is admitted.

Paragraph six alleges that there was an advance payment made by the insurer at the request of the defendant on the 22nd of March, 1946, of $250,000.00, and the amount paid by each plaintiff was shown in column C of Exhibit C. We now offer in evidence Exhibit C, attached to the Complaint.

Mr. Whitacker: There is no objection.

The Court: Plaintiff's Exhibit C in evidence.

Mr. Levitt: This Exhibit C, your Honor, is merely a [3] tabulation, showing each policy number, the name of the Company issuing it, and the amount of the policy, in Column A. In Column B, the amount of the appraisal award apportioned to each policy. Column C, the amount of the advance payment apportioned to each policy, and Column D the amount tendered by each plaintiff, or at least alleged to be tendered by each policy.

Paragraph seven alleges that the time for filing Proof of Loss—If I did not say so, your Honor, I should add the allegations in paragraph six are also admitted by the Answer. Paragraph seven alleges that the time for filing Proof of Loss was extended

from time to time, at the request of the defendant, and that proofs were actually filed on January 4th, 1947.

At this time, your Honor, I should like to offer in evidence the Proofs of Loss filed by the plaintiff.

The Court: That was agreed upon at the pre-trial.

Mr. Levitt: Those Proofs of Loss are attached to the Herrick deposition, and I see the Clerk now has them in his hands. We ask that they be marked Plaintiff's Exhibit D.

The Court: Was there a supplemental——

Mr. Levitt: There was, your Honor, which I will come to in a moment.

It is alleged in paragraph seven of the Complaint, the amount claimed by the Proof was $741,004.41. That, of course, [4] was an amount in excess of the total insurance. The amount demanded from each plaintiff is shown on Exhibit C, which has already been offered and admitted.

Mr. Whitacker: I don't understand that, Mr. Levitt. You say the amount demanded is shown on Exhibit C.

Mr. Levitt: Yes.

Mr. Whitacker: Plaintiff's Exhibit C has to do with the breakdown of the amount paid and the amount tendered under the appraised findings, does it not—it does not deal with the amount demanded.

Mr. Levitt: Counsel would appear to be correct on that. I should say that actually it does show on Exhibit C and Column A—in other words, Column

A is the face amount of each policy. Since the loss called for by the Proofs of Loss was in excess of the face of the policy—it would follow that the amount demanded of each plaintiff was the face amount of each policy—the Column A will actually show that. That allegation of the paragraph is admitted by the Answer.

Paragraph eight of the Complaint alleges that a Notice of Defect in it, or alleged defect in the Proof of Loss, and a request for a Verified Amendments were made or served on January 27, 1947, and within the time provided by the policy, and on February 6, 1947, the defendant furnished its reply to that request, entitled "Reply Affidavit." We now offer in evidence, as Plaintiff's Exhibit next in order, the Reply [5] Affidavit, a printed document, and I had hoped Counsel would be able to furnish me a copy of it.

Mr. Whitacker: I think I can right now.

Mr. Levitt: We now offer in evidence the printed Reply Affidavit, referred to in paragraph eight of the Complaint, the copy having been received just now from Counsel for the defendant. Counsel calls my attention to the fact that there is a certain amount of underscoring and some ink writing—very little on the document, and it will be understood those interlineations are not offered at all.

The Clerk: Plaintiff's Exhibit E in evidence.

Mr. Levitt: The allegations of paragraph eight of the Complaint are admitted by the Answer.

Paragraph nine alleges the plaintiffs disagreed

with the amount of the losses claimed in the Proof, and sent a Notice of Disagreement on February 10th, 1947, in accordance with the policy provisions, and those allegations are admitted.

Paragraph ten alleges, and I will divide this paragraph into two parts: A. That the parties failed to agree within ten days on the value of the sum of the insurance, as to the amount of loss, and the Answer to that is admitted. Failure to agree on the amount of the loss alleged, and no attempt by the parties to agree on the value of the sum of the insurance, so we think that is sufficient admission to alleviate the necessity of any proof of the subject on our part. [6]

Part B of paragraph ten also alleges, on February 2nd, 1947, within the time provided by the policy, plaintiffs demanded an appraisement in writing, and named a competent and a disinterested appraiser. The defendant appointed a competent and disinterested appraiser, and the two appraisers, before commencing the appraising, selected a competent, disinterested umpire. The Answer admits the appraisal demanded on the date stated, within the time provided by the policies, which is admitted, each party to appoint an appraiser, and the two were to select an umpire before commencing the appraisement. In the original Answer, the further allegation that the defendant was without knowledge as to whether the umpire and appraiser appointed by the insurer was a competent and distinterested person, that has been

eliminated by an Amendment, there is no issue as to either the competency or disinterested qualifications of the appraisers, including the umpire.

Paragraph eleven alleges that the appraisers and umpires asked for, and pursuant to the provisions of the policy, time for the completion of the appraisement, which was extended by both parties to May 3rd, 1947. An award dated May 1, 1947, signed by both appraisers and the umpire, was made, and in that award value and loss were estimated and appraised, that sound value and damages separately stated all in accordance with the proof of the policy. The paragraph [7] then summarizes the award, and we now offer in evidence a duplicate original of the award, and ask that this be marked Plaintiffs' next in order—I should say.

The Clerk: Plaintiffs' Exhibit F in evidence.

Mr. Levitt: I should say the date of award is shown as May the 2nd instead of May the 3rd. The allegations of that paragraph, if your Honor will recall, were admitted; I believe that is the paragraph which Counsel pointed out and asked leave to amend and make certain minor denials. In other words, he denied, I think, the allegation that it was all done in accordance with the proof of the policy, not to be in a position of having admitted the validity of the award.

The Court: The document—there is no need of laying the foundation, the document is admitted.

Mr. Lovitt: That is right.

Mr. Levitt: To summarize the award for the

Court, I assume, as we go through the trial, it will be agreeable that the documents offered in evidence by either side are presumed to be read, and either Counsel may point out such parts of the document to the Court as he wishes.

Mr. Whitacker: That is quite agreeable with us, your Honor.

Mr. Lovitt: The award, I think I should read it—it is short. [8]

(Reading):

"The undersigned, Frank Mahoney and Mansen Herrick, duly appointed appraisers, respectively, by the Fire Company Adjustment, Inc., on behalf of the insurers, and insured, and the undersigned, Louis Lilly, duly selected by the said appraisers as umpire, all under the provisions of the California standard form Fire Insurance Policy relating to the ascertainment of loss. After consideration of all facts and arguments presented, a hearing held in San Francisco on March 26 and 27, 1947. Undated briefs filed on behalf of the insured by counsel —and in a letter, dated April 4, 1947, to the appraisers, filed by Kenneth W. Witter on behalf of the Insurance Company and—find as follows:

(1) The effective profit prevented and fixed charges and continuing expenses during the period July 8, 1945, to April, 1946, reduced by profit realized and fixed charges and continuing expenses, recovered by partial operation following the fire, amounted to $591,000.00. (2) The net profit pre-

vented, and charges and expenses which would probably have been earned during the period of twelve months immediately following the fire, amounted to $1,030,000.00."

I might point out for your Honor, that the policy was [9] insured against loss of net profit and continuing charges and expenses. Another section of the policy also provides for what are known as exceeding costs and additional expenses incurred, and so forth. The policy covered a period—a maximum loss period of nine months. That was the loss period, and the maximum time for which loss of net profit and fixed charges could be recovered. Therefore, the period mentioned in paragraph 1, which total, $581,000.00—the period of nine months from the day after the fire, July 8, 1945, to April 7, 1946. Now, you will note that the paragraph of the award says that the amount found as the total of net profit and continuing charges and expenses was reduced in the arrival at this figure of $581,000.00. The profit earned and the fixed charges recovered through partial operation after the fire, as to the $581,000.00 is a net figure.

The second paragraph is a finding of the value of the sum of insurance. In other words, it is necessary, in order to bring the average clause, under the contribution clause, referred to in the pre-trial hearing, to know what the total insurable values were. The total insurable values are based upon a year; in other words, the way the use and occupancy policies are written—they are written for

intervals of a year, and the insured can purchase that kind of a policy, but is limited to the loss of recovery period, a lesser period, which he seeks at this time to do in this case. He is limited [10] to nine months to the average clause on a year basis. The year following the fire, in order to apply that to see if there is enough insurance necessary to have the figure of the total net profit prevented and charges and expenses that would normally have been ended in the twelve months immediately following the fire, that is the million dollar figure stated by the appraisers. That figure resulted in a penalty under the average clause, which I think is the dispute, and we will come to that in a moment. They didn't have enough insurance on the basis of their insurable value.

(3) ——reading again from the Award:

"The expenses incurred by the insured, other than those constituted cost of partial operation for the purpose of reducing the loss under this policy, amounted to $1700 and some odd, which amount does not exceed the amount in which the loss was so reduced. In reaching such findings, the appraisers or umpire did not find it necessary to resolve any legal question or coverage or extent of liability.—Signed, Frank Mahoney, Mansen Herrick, appraisers, and Louis Lilly, umpire."

And their verifications are attached by Mr. Mahoney in Sacramento on May 2nd, and by Mr. Herrick and Mr. Lilly in San Francisco on May

3rd, but the award itself is dated at the bottom May 1st, 1947.

Paragraph twelve of the Complaint alleges that by the [11] application of profit of the policy to the award, and I have particular reference there, of course, to the contribution clause, the aggregate amount payable to the defendant is $491,378.41, amount payable by each plaintiff's proportion thereof, as shown on Exhibit C, Column B.

Now, I assume, Counsel, there is no issue in this case as to the correctness of that portion of paragraph 11. In other words, you will concede by applying the contribution clause to the award itself, assuming it to be correct for the purposes of this point, that it is the correct amount to be paid by the company and is $491,378.41.

Mr. Whitaker: That is correct, that is the amount, your Honor, which is produced by applying the contribution clause factor to the figures found in the appraisers' findings.

Mr. Levitt: It is also alleged in that paragraph, between May 26 and 28, 1947, and within the time provided by the policies, each plaintiff tendered to the defendant the full amount payable by itself, less the amount of the advance payment of Column C of Exhibit C. It is admitted in the Answer that some of the Companies did advance or tender the amount of the award, and I will come to that in paragraph 13, which recites in the Complaint that tender by each of the plaintiffs were refused by the defendant. The defendant said that they would

dispute the validity of the award, and claimed to be entitled to an amount substantially in excess of those tendered [12] and presumed the amount demanded on Proof of Loss was equal to the face amount of the policy, less the advance payment. That allegation is admitted by the Answer.

What actually happened, and I think Counsel will agree to this, is that tenders were made promptly by some of the plaintiffs, but that equally as promptly the attorney for the defendant notified the adjuster for the Insurance Company that the defendant would not accept the amount found to be due, and it tended to dispute the validity of the award, and filing a suit under the policies.

The Court: I understood Mr. Whitaker at the pre-trial conference as not making any amount, but wanted a tender made by each of them.

Mr. Whitaker: You understand me correctly.

Mr. Levitt: Also that the drafts that were tendered were returned by Pickering, and not cashed.

I would like to offer in evidence at this time the original letter dated May 26, 1947, written by Judge Barnett, Paul Barnett, who was then acting as chief counsel for Pickering, addressed to Mr. K. W. Witters, Fire Company Adjustment Bureau, Inc., as Plaintiff's Exhibit next in order.

The Clerk: Plaintiffs' Exhibit G in evidence.

Mr. Levitt: I will offer as the next Exhibit of the Plaintiff——

The Court (Interrupting): Just a minute. What was [13] the substance of that?

Mr. Levitt: I was waiting for the Clerk to mark it.

This letter is written by the attorney for Pickering, to the adjuster for the Insurance Company, and reads as follows (reading):

"Mr. Jack Collins of Cosgrove and Company——"

Will it be stipulated Cosgrove and Company were the brokers for Pickering in this matter?

Mr. Whitaker: I don't know whether they were brokers or agents, if that makes any difference.

Mr. Levitt: They were acting for Pickering, they weren't agents for any insurance company.

Mr. Whitaker: They were the people through whom Pickering purchased the policy.

Mr. Levitt: Notifying Mr. Ben Johnston, the Chairman of the Board of the Pickering Lumber Company, that you had communicated with him, and gave him the distributions of the amount of the award, and all the use and occupancy of business interruption policies held by Pickering Lumber Company, and I presume furnished the distributions in order that he might check his account for Pickering, and it says that Pickering Lumber Corporation intends to dispute the validity and bring suit upon us—and I am very glad to have met you, and so forth.

We now have a copy of a letter from Cosgrove, dated May 29, 1947, addressed to the Fireman's Fund Insurance Company, [14] and ask that it be marked next Exhibit for the Plaintiff.

The Clerk: Plaintiff's Exhibit H in evidence.

Mr. Levitt: This letter, your Honor, is addressed to the Firemen's Fund Insurance Company, and refers to this loss we are talking about, and to a particular fire loss draft in the amount of $6303.30, and reads (reading):

"We have been instructed by Judge Barnett, general counsel for Pickering Lumber Corporation, to return the above draft in accordance with notification to Mr. Kenneth W. Witters, chief adjuster. We intend to protest the award of appraisers in connection with these losses. Yours very truly."

Mr. Levitt: Will it be stipulated, Counsel, I assume, that similar letters of return were sent, and drafts were returned to all other companies that made the tender?

Mr. Whitaker: So stipulated.

Mr. Levitt: Paragraph fourteen alleges that the amount paid and tendered by the plaintiffs is the full amount to which the defendant is entitled under the policy, and that the appraisals and awards are valid and binding on both parties. That allegation, of course, is categorically denied by the Answer.

Paragraph fifteen is an allegation to the effect that if the Court should decree the award invalid, then we wish the [15] Court to fix the amount of the loss proportionately on the ability of each insurer. In that event, their loss would be substantially less than the amount fixed by the award, and that last allegation is, of course, also denied.

Paragraph sixteen alleges that the defendant threatens to institute separate action on each policy, and so forth, and that is all denied in general.

The prayer of the Complaint is that the appraisal award is valid and binding, and the amount payable by each plaintiff is the amount tendered, as shown in Column B, of Exhibit C, and the prayer goes on to cover all alternative matters as well.

At this time, your Honor, the plaintiff rests.

Mr. Whitaker: Call Mr. Momeyer.

FRANK MOMEYER

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Will you state your full name to the Court? A. Frank Momeyer.

Direct Examination

By Mr. Whitaker:

Q. Will you state your name, please?

A. Frank Momeyer.

Q. Where do you live?

A. Sonora, California.

Q. Are you an official of the Pickering Lumber Corporation? [16] A. Yes, I am.

Q. What office do you hold in the Corporation?

A. I am Treasurer and Auditor of the Company, and also Assistant Secretary.

Q. Have you been with the Company for many years, Mr. Momeyer?

(Testimony of Frank Momeyer.)

A. Yes, sir, since 1924, I believe.

Q. Describe for the Court, in a brief, general way, the nature of the business in which the Pickering Corporation is engaged.

A. We carry on a complete sawmill, box factory operation, including the timber operation, the logging operation, bringing in of the logs, and manufacturing the logs into lumber or boxes. We have a planing mill, a dry kiln, and various other units that go into the manufacture of our product.

Q. In connection therewith, do you own now, and operate, a large forest?

Mr. Levitt: I couldn't understand that.

Q. (By Mr. Whitaker): Do you operate a large forest in connection therewith?

A. Yes, we own some eight hundred million feet of timber, and this timber is used in our operation, that is the Standard manufacture of lumber and boxes.

The Court: Where is Standard?

A. About five miles from Sonora, and Sonora is located about 135 miles east of here.

Q. (By Mr. Whitaker): Is has been put in evidence, on [17] plaintiffs' case, that your Company held policies of business interruption insurance of the character shown in Exhibits A and B, with thirty-seven different Companies, aggregating $651,000.00 in principal amount; is that correct, Mr. Momeyer? A. That is right.

Q. And now, Exhibit A is the so-called printed

(Testimony of Frank Momeyer.)

portion of the policy, and Exhibit B is the so-called typewritten attachment to the printed form or policy; is that not right? A. That is correct.

Mr. Levitt: It wasn't typewritten, Counsel. It was actually mimeographed.

Mr. Whitaker: I accept the amendment.

Q. (By Mr. Whitaker): Now, those policies were identical in terms, except for the name of the Company issuing them, the specific several amounts, and the name of the person signing the policy; is that not correct? A. That is correct.

The Court: Mr. Whitaker, I would like to take a recess for about five minutes.

(A short recess was called.)

Q. (By Mr. Whitaker): Were those policies in full force and effect on the 7th day of July, 1945?

A. They were.

Q. On that day, did a fire occur in this plant?

A. It did.

Q. Which portions of the plant were destroyed by that fire——[18]

Mr. Levitt (Interrupting): If the Court please, I assume this question is a preliminary question, and I won't object at this time. I want to point out, I intend to make an objection to the question when Counsel gets into any discussion of the loss itself and details of the loss suffered.

The Court: It is preliminary, I will let it stand.

The Witness: The sawmill burned, also what we call green chain attached to the sawmill building.

(Testimony of Frank Momeyer.)

The Court: What kind of a chain?

A. What we call a green chain, or green sorter—where the green lumber is sorted.

Q. (By Mr. Whitaker): That is really a part of the mill, Mr. Momeyer?

A. Attached to it—it is really a separate structure. The part of the power house—there is two power houses.

Q. Were they damaged?

A. Not completely, because it is a brick structure. The fuel house was destroyed, the fuel house is used for storing the shavings and sawdust, and so forth, used in the power house; this was completely destroyed. That, I believe, is the direct damage caused by the fire.

Q. Was the box factory reached by the fire?

A. It was not reached by the fire.

Q. Was it in operable condition after the fire?

A. It was not for a few days. [19]

Q. Why?

A. Because, in order to dispose of the sawdust and waste material coming from the box factory, we have a blower system that actually blows that sawdust and refuse through a pipe, a distance of about a quarter of a mile from the box factory, to this fuel house I mentioned. When the fuel house burned, the connection, of course, of the blow pipe to the fuel house was damaged by the fire.

Q. And was that blow pipe matter corrected within a few days? A. Yes, it was.

(Testimony of Frank Momeyer.)

Q. And was the box factory then operable?

A. It was.

Q. Was it operated from that time forth, to the exhaustion of your lumber? A. It was.

Q. Did the fire suspend logging ability?

A. It did not.

Q. Were logging operations continued after the fire?

A. They were, for a period of about three months.

Q. Until October 8, 1945, I believe?

A. That is right.

Q. The mill, as it turned out, was entirely suspended, because of this destruction, and not rebuilt for more than a year, is that not true?

A. That is right. [20]

Q. Upon the occurrence of the fire, did you have on hand lumber that had been manufactured or processed to a certain point for use in the box factory? A. We did.

Q. Did you have logs cut and on hand, at the time of the fire? A. We did.

Q. After the fire had gone on—had occurred, and these operations that you have mentioned had continued, did you prepare and file with the Insurance Company, on the date mentioned by Mr. Lovitt, January 24, 1947, the Proof of Loss, Exhibit D?

A. We did.

Q. Now, let me go for a moment to this phase: What was done soon after the fire, if anything was

(Testimony of Frank Momeyer.)

done, with respect to the arrangement for reconstruction of the mill?

A. We immediately gave consideration to——

Mr. Levitt (Interrupting): Pardon me, Mr. Momeyer. I think, your Honor, that in order to keep the record straight, I should perhaps interpose my objection at this time. Counsel is now beginning to go into the details of what occurred after the fire, and I am afraid that, although I thought at first it would be possible to draw a line at this point, he is beginning to prove or attempt to prove grounds for an attack on the award. I don't believe it is possible to draw that line; therefore, I would like to have permission to have the answer the witness so far has given, stricken, and have a chance to make my objection.

The Court: I will strike the answer for that purpose. I think, Mr. Levitt, you can make your objection; then, if I do not sustain it, you may have an objection to all this line of examination, so you won't have to reiterate all the time.

Mr. Levitt: I had that in mind. At this time, your Honor, I should like to interpose an objection on the ground that it has no issue in this case presented with the pleadings, with respect to the validity of the award, and that any testimony to be elicited in connection with actual events that occurred—actual loss that might have occurred from this witness or others, after the fire, is irrelevant on any issues in the case. Basically, the objection

(Testimony of Frank Momeyer.)

is, in effect, a general demurrer or motion to dismiss as to Count One of the Counter Claim, which is, of course, embodied in the Answer itself, by reference——

The Court (Interrupting): Basically, won't your objection go just along the lines stated in your Brief?

Mr. Levitt: Substantially so; yes, I don't—I would like to point this out to your Honor: That the plaintiff, so far as the validity of the award is concerned, rests—upon—behind two lines of defense.

The first, as I already stated, your Honor, has pointed [22] out that the Answer of Counter Claim would be an attack on the award, failing to state any valid grounds upon which—even assuming all the facts are established as alleged by one—the award could legally be set aside by this Court.

Our second line of defense, of course, is that, even assuming that your Honor admitted the testimony, and assuming that your Honor decided at least tentatively for the purpose of the trial a legal basis alleged for setting aside the award, it is our contention that no errors were actually made by the appraisers, and that the award is fair and equitable, with perhaps minor exceptions, where the——

The Court: Of course, I got that all out of your Brief——

Mr. Levitt (Interrupting): This is the only thought I had, if your Honor would care to hear

(Testimony of Frank Momeyer.)

argument, it would be to make something of an analysis of the various points on which the award is being attacked.

The Court: You have done that pretty well in your Brief and in the Pre-Trial conference. For instance, I can tell you without reference to the Briefs, one of them is the question of whether or not these lumber—processed lumber was to be taken in at the O.P.A. price, as appraised, or at the average cost or allocated cost, the O.P.A. price, and allocated cost—the award would be just the same as it is now, or practically the same.

Mr. Levitt: For—if allocated cost had been used, [23] the award would have been less.

The Court: I mean, less.

Mr. Levitt: The question was, as a matter of fact, the O.P.A. price is such—not necessarily used, they were merely used as the basis on which the figure was arrived at. I don't wish to unduly prolong the hearing itself; we can also argue this same point at a later time; if it may be agreed, then, your Honor, that our objection will go to all the testimony offered by the defendant, with relation to any of the fact pleadings, with respect to the invalidity of the award, we will then forego argument at this time, on the assumption we can argue later.

The Court: I would like to give the defendants the opportunity of proving what they claim to be a ground for setting aside these awards. It doesn't seem to me that they have to go into it in great

(Testimony of Frank Momeyer.)

detail, because generally it is conceded that one basis was used by the appraisers, and another basis is what they claim should have been used.

Mr. Levitt: Except this, your Honor, in view of our second line of defense that I mentioned, we are going to have to show, and I believe we can show your Honor, that actually, taking all the facts into consideration, the appraisers did make a fair and equitable award on each of those points. Therefore, in any sense, it would be a waste of time. But if your Honor is going to permit them to go into detail, we [24] will have to go into detail on cross-examination in our case——

The Court: Can't we confine ourself just down to those four points?

Mr. Levitt: We would definitely raise further objection to any attempt to raise points that were not in the pleadings, in opposition to the award.

The Court: I mean, in the introduction of evidence, there is no need of much preliminary evidence.

Mr. Levitt: I would like to say, your Honor, and this has nothing to do with the objection, I neglected to say at the outset, the term "appraise" or "appraisement," as opposed to arbitrate, or arbitration, are two terms frequently used and interchangeable by the Court. I want to make clear for the record, any reference I make to appraisal or arbitration—I do not intend to in any way reflect any difference or dissimilarity between the three,

(Testimony of Frank Momeyer.)

but merely I will use the word indiscriminately, unless I can direct myself particularly——

The Court (Interrupting): I understand that this is the position you have taken here and in your Briefs.

Mr. Levitt: That is right.

Q. (By Mr. Whitaker): And now, then, Mr. Momeyer——

The Court: Your question—last question was whether or not you proceeded—could proceed immediately to take steps to have the mill rehabilitated.

Q. (By Mr. Whitaker): That is it. Did you?

A. Yes.

Q. Explain very briefly to the Court—we don't want to take a lot of time on this matter, it is preliminary—what you did.

A. On or about July 12, that was just before—five days after the fire, we contacted E. D. Filer and Stole Company, representatives, for the purpose of finding out whether they could furnish the sawmill machinery promptly—they are one of the largest builders of sawmill machinery. On the assurance they could start building our sawmill machinery, on about September 1st they would start shipping it—around October 1st we finally gave them the contract for the building of our mill machinery—they expected to develop one side of the mill first—about January 15th or February 1st——

(Testimony of Frank Momeyer.)

Q. (Interrupting): Of 1946?

A. Of 1946, we thought we could have one side of our mill in operation by that time, on the information they gave us.

Q. Were both those sides the same size?

A. No, there is what we call a large side and a small side of the mill, what we call a two-sided mill, or two head rigs; usually one side has a large side, and the other side has a small side, and the big side or large side is used for sawing the larger logs, and the small side for the smaller logs.

Q. Which side of the mill was to be furnished and installed first? A. The large side. [26]

Q. What were your normal operations at the time of the fire—I mean, with respect to shifts and hours?

A. We were operating a day and night shift, eight hours each, at the time of the fire, I believe.

Q. Operating two shifts of that duration, using the big side of the mill, how many board feet per day are cut?

A. From 200 to 200 and 25 thousand feet per day.

Q. The Company had down, I believe you said it did have down and cut on hand at the time of the fire, certain logs? A. It did.

Q. Can you tell us the number of board feet, mill scale?

A. Right around nine million feet.

Q. Was it 9,550,000 feet? Will you look, please?

(Testimony of Frank Momeyer.)

Mr. Levitt: We will stipulate.

A. (Interrupting): 9,559,000.

Q. (By Mr. Whitaker): Then was the term——

The Court: That is finished lumber?

The Witness: That was logs, your Honor, logs on the ground—in the woods, or in the pond, or in the deck, not yet through the sawmill.

Q. (By Mr. Whitaker): How many of those logs were in the pond, at the mill site?

A. Slightly over 4,000,000, I believe.

Q. And where were the rest of them?

A. The rest of the logs were either in the deck, at the plant—[27] a small footage was in the deck at the plant, on the ground, in the woods, or stored at the rail head, ready for transporting to the mill from the logging operations.

Q. Was any determination made after the fire, and after this arrangement with Filer and Stole, for the reconstruction of the mill you have stated, to cut more logs? A. Yes.

Q. How many more logs was determined to cut?

A. Approximately 6,000,000 more logs.

Q. And now, under paragraph ten of the policy, there is in it—there is a covenant that you are to engage in partial operation as soon as practical, to the extent possible of reducing logs?

A. That is correct.

Q. And now, when did you resume logging?

A. Within a few days after the fire, we resumed the hauling in of the logs that were on the ground,

(Testimony of Frank Momeyer.)

because we felt they would have to be brought into the plant, regardless of what we did about bringing in other logs that had not yet been felled. I think it was about July 27th we actually started to fall some more timber for the purpose of bringing in the 6,000,000 feet approximately—that is what we decided to bring in addition to that.

Mr. Levitt: What was that date?

A. I believe around July 27th, I think. [28]

Q. (By Mr. Whitaker): And was the cutting of the logs then resumed? A. It was.

Q. What type of timber were you cutting at that time of the fire?

A. In pine and fir, and cedar. Ponderosa pine, sugar pine, fir, and cedar,—cutting heavy on the pine, about 60% pine.

Q. Did you continue cutting after the fire, in that forest—that kind of timber?

A. We did not.

Q. Did you move the logging operations—the cutting operations, I mean, after the fire, to other areas? A. Yes, we did.

Q. To what area?

A. To an area that was practically all fir timber.

Q. Why?

A. Because fir logs are not subject to depreciation that occurs in pine logs; that is, there is—they are not subject to as much depreciation, weather conditions and stain.

Q. Was that fir area to which you moved—strike

(Testimony of Frank Momeyer.)

that, please. Why was that an important fact, that the fir was not as subject to depreciation or deterioration as pine——

Mr. Levitt (Interrupting): I will——

Mr. Whitaker (Interrupting): He said he moved to a fir area, which was important——[29]

Mr. Levitt: I will object to that, on the ground that it is calling for the conclusion of the witness.

The Court: I think he is familiar with it. I will allow it to be answered.

Q. (By Mr. Whitaker): Why was it done?

A. Because we were in the hot season of the year in July, and pine logs will stain very badly at that time of the year. We didn't want to take a chance of accumulating more pine logs that would be subject to a terrible loss from depreciation.

Q. Was it obvious that these logs would be cut in the regular mill—in the regular mill length of time after cut, or that there would be a further delay than is normal?

A. That there would be more than a normal delay in cutting them.

Q. Was that fir area, to which the cutting operation was moved after the fire, closer to the log railroad, and logging camp, or further?

A. It was farther away.

Q. Did the loggers have a particular place where they lived?

A. Yes, they lived at one of the centralized logging camps.

(Testimony of Frank Momeyer.)

Q. In the mountains?

A. In the mountains.

Q. And do they return to that place each evening? A. They do.

Q. Was there, or was there not, a further distance to travel [30] to the new logging area than to the old?

A. It was a greater distance of travel.

Q. Were there roads to the new logging area—the fir area?

A. There were some roads that had been used in the past on other areas, but they had to be extended and rehabilitated before they could be used for this new operation.

Q. How were the logs brought from the forest fir area, where cut, to the logging railroad?

A. They were brought by large trucks.

Q. Where were those trucks kept?

A. They are kept at the main logging camp.

Q. Was there any greater distance in hauling logs than before?

A. Yes, there was a greater distance.

Q. Could the logging trucks make—haul as many feet of logs, make as many trips from this fir area, as from the pine?

A. No, they could not, they made less round trips per day.

Q. Was this logging of the fir conducted at your maximum capacity for logging logs?

A. No, it was not.

(Testimony of Frank Momeyer.)

Q. Why?

A. Because we were going at too great—approximately 6,000,000 feet of logs, and it wouldn't be practical to set up a maximum logging operation to bring in the small footage.

Q. Did that enable you to have to dispense with your logging superintendent, and the like overseeing personnel? [31] A. It did not.

Q. How many feet of logs were, in fact, cut after the fire to October 8th?

A. 5,800,000 feet, just slightly over.

Mr. Levitt: How many feet?

A. 5,800,000 feet—just slightly over.

Q. (By Mr. Whitaker): How many feet of logs were brought into the mill after the fire, including those cut before the fire, as well as after the fire?

A. About 11,000,000.

Q. And now, under the terms of this policy, did you credit the claim that you included in your Proof of Loss with the amount of fixed, general logging overhead expenses, recovered from that partial logging operation?

Mr. Levitt: You are speaking now of the claim itself, Counsel?

Mr. Whitaker: The Proof of Loss, yes. I may say—I would like to say to His Honor and to Counsel that it is not my purpose here to prove the facts and amounts with the exactness at this time; I am merely leading up to show how the claim of the Proof of Loss was constituted.

(Testimony of Frank Momeyer.)

Q. (By Mr. Whitaker): Have you my question in mind?

The Court: Doesn't the Proof of Loss show that, itself?

Mr. Whitaker: Yes, it really does. I think I can make that very brief, if I may. [32]

Q. (By Mr. Whitaker): Are you referring to the Proof of Loss? A. I am.

Q. Please point out, state where the Proof of Loss credits the claim with the recovered fixed charges and the expenses of the partial logging operations.

A. On page 20 of the Proof of Loss, Schedule Roman numeral III, you will find a summary of the recovery by partial operation—the recovery in particular of this logging operation recovery that we are talking about would be found on Schedule R-1, on page 21, of the Proof of Loss.

Q. What was the rate per thousand feet that you credited in that claim as the recovery of fixed charges and continuing expenses by partial logging operations?

A. $5.32 — 5.31993, being carried out to five places, approximately $5.32.

Q. That was allowed on the full 11,301,377 feet of logs, brought to the mill after the fire?

A. That is correct.

Q. And that $5.31993, times 11,301,877, is $60,-125.19? A. Correct.

Q. Was the Proof of Loss credited in gross with

(Testimony of Frank Momeyer.)

that amount of fixed charges and expenses from partial logging operations? A. It was.

Q. And now, in this claim, this Proof of Loss, in respect to this [33] same subject, did you set up and claim any exact costs for conducting logging operations after the fire? A. We did.

Q. What do you claim the Proof of Loss was your cost of bringing in logs to the mill site before the fire? A. $21.91.

Q. Is it not 21.9133?

Mr. Levitt: What page, Counsel?

The Witness: Page 22 of the Proof of Loss. 21.91339.

Q. (By Mr. Whitaker): And what was the cost of bringing in the logs to the mill site after the fire?

A. $25.51592.

Mr. Levitt: Is that the same page——

The Court: That is per thousand?

The Witness: Yes.

Mr. Levitt: Is that the same page?

The Witness: Page 22, yes.

Q. (By Mr. Whitaker): And the difference in bringing in the logs, therefore, before and after the fire, was how much? A. $3.60.

Q. And that $3.60, times 11,000,000 feet of logs, brought in after the fire, was how many dollars?

A. $40,715.40.

Q. By the way, in that connection, did the logging cost—the cost of bringing in the logs, remain about the same from [34] the beginning of the log-

(Testimony of Frank Momeyer.)

ging operation, to the end of the season, or is there some change?

A. There is a change during the maximum production period of the season.

Q. Will you very briefly explain why?

A. We log generally from about April 15th—to May 1st, to November 30th of each year. When you start your operation in April or May, you have weather problems to deal with; the roads are not dried out yet, and various other problems of getting the operation started. Your overhead expenses continue at the same rate as they would if you had maximum production, but you are unable to get your maximum production at the start of the season, because of the difficulty of getting started, and so forth. Therefore, the rate per thousand is higher at the beginning of the season than it is after two or three months of the season, by getting into the good-weather period of the season. When you are in the good-weather season, and you bring in your maximum production, your footage goes up, and your rate per thousand goes down—your cost per thousand.

Q. Was that true in the loss year—the year following the fire?

A. It was not; the cost went up during the period that normally would be a low cost period.

Q. This amount you stated—$3.60 per thousand?

A. That is right.

Q. Now, what did you do with those logs—those

(Testimony of Frank Momeyer.)

eleven million, some odd thousand feet that were brought in the mill site, after the fire?

A. We had to deck practically all of them.

Q. By "deck," what do you mean?

A. Standing them in rows, like you stand up cords of wood, as in your home, perhaps.

Q. Why don't you just let them lie on the ground?

A. Because the weather condition would cause greater depreciation.

Q. Did you have any more room in the pond, in which to put these logs?

A. No, very little room—the pond was practically full of logs at the time the fire occurred.

Q. Did you have a decking yard at the mill site, at the time of the fire? A. We did have.

Q. Was it large enough to accommodate as many logs as were brought in after the fire?

A. It was not.

Q. Was it necessary for you to extend the decking yard?

A. Yes, it was necessary for us to enlarge it and build fir tracks to our railroad, to accommodate the new area we were going to use for decking. [36]

Q. Did that cost money? A. It did.

Q. How much?

A. The total cost of the work, plus the actual expense of putting them in the deck, the actual lifting of the logs in the car and putting them in the deck, amounted to $12,492.35.

(Testimony of Frank Momeyer.)

Q. Normally, would you have, if the mill had been operating, had to lift those logs from the car and put them in this deck?

A. Not that quantity; we would deck a small footage, nothing like the quantity we had after the fire.

Q. These extra logging costs that you have mentioned, and the extra decking expense, were in the claim, that Proof of Loss filed with the insurer, or plaintiff, deducted from the gross recovery of the $6,125.19, is that not true?

A. They were actually not handled in the same schedule, but they were considered as a part of that partial logging operation.

Q. And deducted from that gross recovery?

A. That is right.

Q. And in the schedule which you have—I will withdraw the question, please.

Q. By the way, Mr. Momeyer, did the machinery ordered from Filer and Stole arrive on schedule—the sawmill machinery? A. It did not. [37]

Q. Why not?

A. Shortly after Filer and Stole started to build our machinery, on October 8th, I believe it was October 8th, 1945——

Q. (Interrupting) You don't mean that is when they started to build?

A. Shortly after they started to build the machinery, they started around September 1st, 1945—

(Testimony of Frank Momeyer.)

about October 8th, 1945, a strike occurred at their plant, and the balance of our machinery stopped.

Q. How long did that strike continue?

A. Until about April, 1946, or sometime in April, 1946.

Q. And meanwhile, did you cut any more logs in the woods after that date, October 8th, when you got word of that strike? A. We did not.

Q. And did these logs that were on hand at the time of the fire, and that had been cut after the fire, prior to October 8th, remain at the mill—remain until the mill was finally in operation?

A. In the logging deck, or in the pond.

Q. When did you finally get the one side of the mill in operation?

A. On August the 1st, 1946.

Q. I believe I omitted to ask you preliminarily, did you, at or about the time you made this agreement with Filer and [38] Stole for the manufacture and supplying of the sawmill machinery, also contract with others for the construction of the mill—the construction of the building? A. We did.

Q. And who was that?

A. H. H. Larson and Company, contractors, located here in San Francisco, the head office.

Q. And was the structure to be ready to receive the mill machinery, as it arrived? A. It was.

Q. On August 1, 1946, you say one side of the mill was in operation—ready to operate?

A. That is correct.

(Testimony of Frank Momeyer.)

Q. And now, had you any intention up to that time to make any test cuts in the logs in the deck and in the pond, to determine what their condition was? A. We did.

Q. Was it not obvious, from the external examination, there had been deterioration?

A. It was quite obvious, there was substantial deterioration.

Q. Did the Company take any steps to have significant tests made to determine the amount of such depreciation, and when it had occurred?

A. It did.

Q. Please explain very briefly to the Court what steps you [39] took?

A. We realized that an expert would be needed to determine the amount of depreciation and the period in which the depreciation had occurred. Therefore——

Q. (Interrupting) May I interrupt right there? Why did you want to know the period in which it occurred?

A. Because we could not make our Proof of Loss without knowing how much occurred in the nine months' period following the fire, and how much occurred in the twelve months' period following the fire.

Q. All right, continue.

A. We then contacted the Western Pine Association, who are located at Portland, Oregon, and told them our problem, and asked them to send us

(Testimony of Frank Momeyer.)

a man that could make a test run of these logs, and calculate for us the amount of depreciation on the logs. They sent one of their lumber inspectors, Lee Moffit, to do this work. We also at the same time, because Mr. Moffit had told us that he could not tell which period the depreciation occurred—we then contacted Mr. Henry Thomas, who is a timber expert, also located at Portland, Oregon, and asked him to come to our plant and watch the work that Mr. Moffit was doing, and that we were going to ask him to determine for us the period in which the depreciation occurred, whether in the nine months' period or the twelve months' period following [40] the fire, or after the twelve months' period.

Q. Did Mr. Moffit arrive and Mr. Thomas also?

A. Yes, they arrived around November 1, 1946.

Q. Did Mr. Moffit select a represenattive sample of logs in the deck and in the pond?

Mr. Levitt: I will object to that, on the ground it is calling for the conclusion of the witness.

The Court: I think I will let him answer it.

Mr. Levitt: Counsel, do you want to introduce the report, or anything like that? I don't think we will object to that, as far as it is concerned.

Mr. Whitaker: The report is here. It is in detail. I thought you had a copy of it—I thought we would just cover it generally; I don't believe there will be any need to clutter the record with a long document.

Mr. Levitt: Your question, you see, was directed

(Testimony of Frank Momeyer.)

to the point of having this witness testify of his own knowledge, as to the validity of the tests. I am not objecting to his testimony of what the test shows, I only don't think it is proper to prove what these people did, or what they thought, by this witness; that is my point in objecting.

The Court: I think you are right about that. I thought he was just bringing in generally the facts whether that there was some depreciation.

Mr. Levitt: I have no objection to that. [41]

The Court: Whether they were correct or not.

Q. (By Mr. Whitaker): How many feet of logs were selected by Mr. Thomas, if you know, to run through the mill for these tests?

Mr. Levitt: Can't we get to the conclusion, Counsel, what they found?

The Court: In other words, it was a spot test, was it?

The Witness: That is right, Your Honor, about 200,000 feet.

The Court: And they reached a certain conclusion?

The Witness: That is correct.

Mr. Whitaker: Let's get to that.

Q. (By Mr. Whitaker): Speaking with reference to that time, what damage did they find?

A. Stain, check rot, and brashness.

Q. Now, treating with the check rot, how much per thousand feet on sugar pine did they find that damage had amounted to?

(Testimony of Frank Momeyer.)

A. $9.69 per thousand.

Q. On how many feet of the sugar pine?

A. 1,820,067 feet.

Mr. Levitt: May I suggest this: You asked me if I would have any objection, on pre-trial, any objection to your introducing the record generally to establish what damage there was, and whether or not it was correct. If it is merely to show that Pickering had a record, I am perfectly willing [42] to stipulate that Pickering had a record—and perfectly willing to stipulate to the amount of alleged depreciation and what was said by these people. Do we have to go in all these details?

The Court: I think it would be sufficient.

Mr. Whitaker: May I read it into the record, then, the summary as shown in the examination and from this report, or have the witness do it?

Mr. Levitt: Show it to me—what you want to read, and maybe we can stipulate to it.

Mr. Whitaker: Here is what we will read right here.

(A conversation was held out of hearing of the reporter.)

The Court: It is about noon time, gentlemen, and I have a Memorial for Judge St. Sure this afternoon at two o'clock, and then I have a case that was partially argued last night, and it went over to three this afternoon. I wonder if we could continue this until tomorrow morning at ten o'clock?

(Testimony of Frank Momeyer.)

Mr. Levitt: Certainly.

The Court: I have to be present at two in Judge Roche's court, in connection with this Memorial Service that they are having in there today. You can examine that document in the meantime. We will now stand adjourned.

Certificate of Reporter

I (we) Official Reporter(s) and Official Reporter(s) pro tem, certify that the foregoing transcript of 43 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ GEORGE WHEELER,
By /s/ ELDON W. RICH.

[Endorsed]: Filed February 23, 1950. [43]

Wednesday, June 8, 1949

The Clerk: Case of American Insurance versus Pickering Lumber.

Mr. Levitt: Your Honor, before we proceed taking testimony, there is one point I would like to clarify for the purpose of the record which counsel stated on pre-trial, that should be clarified in the trial record. In the answer, that is the counter claim which has to do with the attempt to set aside the appraisal award, there are a number of allegations related to procedure on the matters with respect to what the appraisers did, how the proceed-

ings were conducted, for example there is an allegation that there was a single appraisal instead of a separate appraisal on each policy, sort of an implied inference that it was improper, a separate appraisal on each policy.

Mr. Whittaker: May I say in that connection, and to answer one at a time we do not contend that was improper, or irregular, it was done merely to explain the fact that each policy does call for a separate appraisal, we are not complaining about it.

Mr. Levitt: The next point they allege, is that in regard to the hearings that they were granted, that they didn't call any witnesses, except those that appeared without subpoena, and that no subpoenas were actually issued by the appraisers—no allegation that any subpoenas were requested, I would like to state—and I come to state whether he intended to reply on that point. [1]

Mr. Whittaker: I think counsel misconceived the point, that allegation, that was a collateral allegation—a negative idea of arbitration, that is all that was for.

Mr. Levitt: Not one of the grounds of your attack on the award?

Mr. Whittaker: Offered as far as the negative——

Mr. Levitt: (Interrupting) That is a question of law, your Honor.

The Court: I understand the defendant's position of being this was an appraisal, even though the

appraisers had a hearing, weren't required under the policy to do so.

Mr. Levitt: Of course, your Honor, whether arbitration or appraisals, whether the parties weren't subpoenaed or not is something entirely up to them — they didn't ask for any, it wouldn't prove——

Mr. Whittaker: (Interrupting) The same situation exactly as the one I have stated applies to that phrase.

The Court: Just set that up to show the appraisal under——

Mr. Levitt: (Interrupting) We don't concede any relevancy to that point at all. The final one is an allegation that after the hearing, the appraisers obtained testimony, or evidence from parties, and third parties——

Mr. Whittaker: (Interrupting) That is exactly the same position as the one we have stated that the arbitrator had no [2] right to do that, that the appraisers would.

The Court: I understand the position.

Mr. Whittaker: Shall I proceed?

The Court: Yes.

Mr. Whittaker: Mr. Momeyer, will you resume the stand, please?

FRANK MOMEYER

called as a witness on behalf of the defense, being previously sworn, testified as follows:

Mr. Whittaker: Mr. Reporter, I hand you a

(Testimony of Frank Momeyer.)

document and ask that it be marked Defendant's Exhibit——

The Court: (Interrupting) What is the document?

Mr. Whittaker: The profit report.

The Clerk: Defendant's Exhibit 1 for identification.

Mr. Whittaker: I now hand to the Clerk, a document, and ask that it be marked as an exhibit, this is the Thomas report.

The Clerk: Defendant's Exhibit 2 for identification.

Mr. Whittaker: I just want to ask the witness to identify this.

Q. (By Mr. Whittaker): Mr. Momeyer, I hand you what has been identified as Defendant's Exhibit 1, and ask you to state what that is.

A. That is the report of Mr. Lee Moffitt of the Western Pine Lumber Graders on the test run that he made of the logs that we [3] had stored in our log deck following the fire on July 2nd, '45.

Q. I now hand you what has been marked Defendant's Exhibit 2, and ask you to state what that document is?

A. This is a report from Mr. W. H. Thomas, Timber Engineer, Portland, Oregon, reporting to us at the time in which the depreciation on those logs occurred, and the period that he believed it took place following the fire July 7th, '45, as to stain, end checking and other depreciations.

(Testimony of Frank Momeyer.)

Q. Those are photostatic copies which purport to be, is that what they are?

A. They are photostatic copies of the report.

Mr. Levitt: Your Honor, it is going to take me just a few minutes to look at these, I haven't seen them before, they are rather lengthy.

The Court: Would you rather have me take an adjournment for ten minutes while you look it over, is that satisfactory?

Mr. Whittaker: Quite all right by me, your Honor.

(A short recess was called.)

Mr. Whittaker: If the Court please, the defendant now offers in evidence Exhibits 1 and 2, and say to your Honor, that I am not offering them for the purpose of here attempting to establish evidentially the fact of the literal truth of these records, for I realize that is not here in issue, I am offering them for the purpose of showing the basis upon which we constitute the $36.00 odd claim of the depreciation of the [4] proof of loss.

Mr. Levitt: If I understand——

The Court: (Interrupting) You are not introducing them for the purpose of their contents, merely for the purpose of showing upon what basis —that is, the basis upon which you figure the loss.

Mr. Whittaker: That is substantially correct, your Honor.

Mr. Levitt: May I restate, as I understand it,

(Testimony of Frank Momeyer.)

your Honor, this is one of the items of claim to which they are attempting to set aside the award, is that the logs after the fire suffered depreciation, and we agreed that certain reports were made, and these reports that are referred to as Defendant's Exhibits 1 and 2, were made to the Pickering Company by men who they employed for that purpose, of giving the opinion of these specific individuals with regard to the extent of the depreciation suffered after the fire. And now, these are the two reports giving their opinion, and I understand now, counsel is not offering the report to show the logs actually did suffer the depreciation stated in the report, but merely offering them to show that Pickering had this information in his possession at the time he prepared the claims——

Mr. Whittaker: (Interrupting) That is my purpose at this moment.

The Court: They will be admitted for that purpose, that [5] limited purpose. What is the date of that Moffitt report?

Mr. Whittaker: The date of the Moffitt report is November 22, 1946.

The Court: And the Thomas report?

Mr. Whittaker: The date of it is November 20, 1946 which is number 2.

Mr. Whittaker: In view of the nature of the offering, and receipt of these documents in evidence, unless the Court desires, I shan't read them, I want to do what the Court thinks I should do.

(Testimony of Frank Momeyer.)

Mr. Levitt: I don't have any objection to them reading, that won't change the limited purpose for which they are offered.

Mr. Whittaker: I should then like to read, your Honor, for Defendant's Exhibit 1, not including the logging schedule attached. (Reading) Pickering Lumber Corporation, Standard, California, November 22, 1946. Gentlemen: The writer is a lumber inspector currently and regularly employed by the Western Pine Association to inspect the grade of lumber manufactured by the mills in the Western pine producing areas under the current grading rules of the Western Pine Association. My duties as lumber inspector for the Western Pine Association has been continuous for the past thirteen years. My qualifications to become an inspector for the association include thirteen years previous experience as a grader, as a lumber shipper at [6] several of the large pine mills in California, and Oregon.

One of the functions of the Western Pine Association is to maintain a staff of trained lumber technicians to render service to the manufacturers of pine lumber. As an employee this case was assigned by the Western Pine Association the task of inspecting lumber produced from logs in the deck at the plant located at Standard, California.

It is my information that the sawmill of the Pickering Lumber Company was destroyed by fire on July 7th, 1945. It is my understanding that the logs decked at the plant of the Pickering Lumber Com-

(Testimony of Frank Momeyer.)

pany at Standard, California, were placed in this deck during the late summer and fall of 1945, following the loss of the sawmill by fire.

The object of my task was to determine the grade and quantity of lumber that represented logs from this log deck would produce. This work was begun on November 1 and completed on November 22nd. My first step was to select representative logs of sugar pine, ponderosa pine, white fir, and incensed cedar from this deck. Approximately 88,000 feet of white fir logs were selected, about 60,000 feet of sugar pine, 78,000 feet of ponderosa pine, and approximately 7,300 feet of cedar log were selected. The logs were picked from various locations within these decks, in order that a fair representative sample of different size logs, and different grades of logs in each species might manufacture it to lumber. Only logs with bark on [7] them were selected. The logs which I selected were identified by markings with yellow crayon on the end of the log. These logs were taken out of the deck and dumped into the pond and kept segregated from all other logs.

The sawmill was first cleared of lumber manufactured from other logs, and these sample logs were manufactured into lumber in the usual and normal manner. The writer was present in the sawmill during the sawing of these logs into lumber, and observed the customary sawing methods were employed.

The lumber from these logs was marked with a

(Testimony of Frank Momeyer.)

special distinguishing mark, and it was manufactured, and kept separate and dried separately in the dry kiln. This lumber was also segregated and graded by me under the current grading rule of the Western Pine Association, on three different bases. First the lumber was graded as produced from fresh logs, and without regard to defects appearing in the lumber which had developed in the logs during the period of storage, in other words, just as if the lumber were cut from fresh logs. The timber tally by grade species and sizes was made on this basis, and this is shown in tally 1A. Second, this same lumber was again graded with defects developing in the lumber caused by deterioration of the logs during that storage, and each piece was so marked as to cut off, or ripped if necessary the place—placed the lumber on the grade and in the current salable position, and tally on the next size and grade in which it would have to be [8] shipped to the best advantage under the current grading rules, this is shown in tally number two. Third, logs in the deck were in storage so long that rot, much rot and numerous worm holes developed, this third basis of grading was on the basis of considering the rot, not the defect, and merely giving notice to the stain and some worm holes in the pieces, figuring that the portions of the pieces which was rotten, was also stained before the rot set in.

To obtain tally number three, stained and rotten boards were separated from the ponderosa pine and sugar pine during the first grading (tally 1B).

(Testimony of Frank Momeyer.)

This portion amounted to approximately one-half of the total of the pine. Stains and rot on the boards were then run over the grading table, and graded on the same basis as the first run, except the rot was considered as being only stain.

The items of lumber shown in tally 1A represented boards of little value under ordinary manufacturing methods, and would have been cut for refuse in the mill. The items shown in tally number two and three, are the same boards plus those that have developed from the higher grade class of rot or worm holes.

In making this check, the writer personally graded and marked the grade on each board, and supervised the tallying of the entire stock of lumber developed making these tests as now intact in the shed, and observed the marks placed on each board.

Tally 1A, number two, 1B, and number three, showing the [9] grades and sizes turned out on the three bases. I attach those here for you to use. Your very truly, Lee Moffitt, Inspector for the Western Pine Association and shows schedules that are attached. (Close reading.)

Mr. Whittaker: I now read, your Honor, Defendant's Exhibit No. 2, being on the letterhead of Thomas and Jackson, Forest Engineers, Portland, Oregon, November 20th, 1946.

(Reading) Dear Sir: We according to your request made an inspection of the saw logs you have in the cold deck or in storage at Standard, Cali-

(Testimony of Frank Momeyer.)

fornia. At the present time these cold decks hold all the logs that we felled and/or bucked on July 7th, 1945, and also some additional logs produced after these dates, but before winter had shut down for the purposes of my inspection to determine as closely as possible the deterioration that has occurred to these logs, from July 7th, 1945 to April 7th, 1946, and from April 7th, 1946 to July 7th, 1946, and July 7th, 1946 to date.

As an aid in this determination, a sample of 239 board feet of logs were selected from this cold deck, and converted to lumber which was then carefully tallied and graded. I observed the selection of these log samples, and am convinced it is a fair representation of the logs in the entire cold deck.

After taking into consideration my past experience in deterioration of pine and fir saw logs that have been felled, and bucked in log decks for an unusual period of time, and particularly [10] based on an inspection of the actual sawing of a sample of the logs taken from the log decks at Standard, I recahed an opinion as to the rate of deterioration of the Pickering Lumber Corporation saw logs in the deck above mentioned. The rate of deterioration is shown percentagewise on the attached schedule.

I show four causes of deterioration, namely, stain, decay, end checking, and brashness which are described in this order.

In stain, it is my experience and all other operators experience of which I am familiar, show con-

(Testimony of Frank Momeyer.)

clusively all the pine logs cut prior to July 7th, 1945, in the Stanislaus region, the Northern California region, or Eastern Oregon region, would incur all of the stain loss by April 7th, 1946.

The decay, it is a well known fact nearly all of the decay in logs that are decked, the logs are infested by bark needles, timber felled prior to July 7th, 1945, would be well infested by the following September, and rotting fungi would become well established with the entrance of the needle, very little rot would occur by April 1946. The decay then becomes progressively more pronounced and the progress of the decay is shown in the attached schedule which in my firm opinion is a fair statement of same.

Checking, the larger part of deterioration caused by end checking took place in the latter part of the period, the [11] amount of end checking varied with the size of the logs, the exposure, and the bark thickness, the distribution of the total loss of this nature is shown here based on my past experience on several operations.

Brashness, most of the losses caused by brashness will be found in the white fir, and vary with the number of hot and cold seasons. Some fir logs which is good since cutting, I would consider that no loss occurred in the white fir logs from this cause during the first nine months, but ten per cent in the next three months. There is a certain amount of brashness in all ponderosa and sugar pine logs, this

(Testimony of Frank Momeyer.)

usually shows up in checking particularly all the surfaces cutting this loss to the pine logs is included in the checking loss.

I have no data on losses resulting from age and in incensed cedar logs other than a firm conviction that approximately no loss in that species occurred in the first twelve months since the timber was cut.

Respectfully submitted, Thomas and Jackson, W. H. Thomas, attached is a percentagewise description of the findings.

(End of reading.)

Q. (By Mr. Whittaker): Mr. Momeyer, you received these reports? A. I did.

Q. Did you thereafter as auditor for the defendant company following the formula set forth in the findings of these reports [12] compute the amount on the checking, brashness, stain and rot loss to the logs in the deck that had been cut before the fire? A. I did.

Q. And what was that amount, approximately?

A. $36,149.95.

Q. Where, in what schedule and what page of the proof of loss is that contained?

A. That is contained on page 17 of the proof of loss, schedule D8.

Q. And now, Mr. Momeyer, did you following the formula and findings of Mr. Moffitt, and Mr. Thomas' report, compute the stain rot, end checking and brashness, degraded, or depreciation on the five

(Testimony of Frank Momeyer.)

million eight hundred and forty-four thousand nine hundred and ten feet of logs cut after the fire?

A. I did.

Q. What was that amount? A. $2,081.64.

Q. Was that carried to the schedule in the proof of loss as an expense of partial logging operations, and if so, what page of the proof of loss.

A. It was, and it will be found on page 22 of the proof of loss schedule IIIR4.

Q. And now, this is a summarization of the figures in respect to the partial log recovery, and the expenses in producing that gross recovery, you have testified that the total recovery was [13] $5.31 on 11,301,877 feet of logs brought into the mill site after the fire, or $60,125.18, have you not?

A. Yes, correct.

Q. And now, that was the gross amount with which this proof of loss credited the claim on account of recovered expenses, and continuing costs from partial logging operations, correct?

A. That is correct.

Q. And now, you have testified that you charged against that amount the excess log cost of $3.60 per thousand comparison costs of the logs brought in after, as compared to the logs brought in before the fire, on 11,307,877 feet or $40,715.40?

A. That is correct.

Q. Then this $2,081.64 you have just testified to is the depreciation on those logs that had occurred after cut, after the fire, and then deducting also the

(Testimony of Frank Momeyer.)

$12,692.35 you have testified to as extra decking expenses in decking logs in the decking yard at the mill site make a total deduction of $55,269.39, does it not? A. That is correct.

Q. From the $6,125.19, and the difference $4,085.80? A. Correct.

Q. Which would be the net recovery from the partial logging operation? A. Correct.

Q. And now, Mr. Momeyer, we pass to another subject, the box [14] factory operation after the fire. The company, did it not, have a certain lumber on hand at the time of the fire? A. It did.

Q. Some of which was suitable for the manufacture of boxes? A. Yes.

Q. Some of which — that which was formerly known as box lumber? A. That is right.

Q. And now, had Pickering Lumber Corporation produced that lumber itself? A. It had.

Q. And for what purpose had it produced the so-called box lumber?

A. For the use in a box factory, produced box shook.

Q. Did it ever offer to sell that lumber as lumber? A. It did not.

Q. And, of course, didn't sell it as lumber?

A. No, sir.

Q. You ran it through the box factory?

A. That is right.

Q. And now, getting to the amount—just a moment, first I want to ask you—I believe this is cov-

(Testimony of Frank Momeyer.)

ered by the pleadings, but I want to cover it briefly, was it possible to buy box lumber at the time of or following the fire at O.P.A. ceiling prices? [15]

A. It was not possible.

Q. Did Pickering Lumber Corporation ever produce for sale, or offer to sell as far as you know, that type of lumber called box lumber?

A. We did not.

Q. And now, just as an aside, did you actually after the fire run through the box factory and produce there from into box shook certain grades of lumber, even higher grades than box lumber?

A. We did.

Q. And during the loss?

A. We did, yes, sir.

Q. And now, Mr. Momeyer, how much lumber as shown by your book was run through the box factory starting with July 8th, I realize you didn't get into the box factory for two or three days after?

A. That is right.

Q. Starting as soon as you did start the box factory after the fire, how much lumber was run through the box factory as box shook?

A. 8,828,644 feet.

Q. How much box shook in board feet did that produce? A. 8,636,974.

Q. And now, Mr. Momeyer, in constituting the —may I ask you first, this box factory operation conducted after the fire, was [16] a partial operation the profits of which to be credited against the

(Testimony of Frank Momeyer.)

claim, and to be for the benefit of the insurance company, is that correct? A. That is correct.

Q. And now, in consulting your claim, the proof of loss, would you tell us how it was done?

A. We first took the cost of 8,828,644 feet of lumber, used in the box factory, that was $39.86 per thousand feet, and to this added the cost of manufacture in the box factory, the work of processing the lumber through the box factory unit, that was $11.65. Then we found shipping expenses $11.65 per thousand.

Mr. Whittaker: I haven't been saying per thousand, it is pretty familiar to us.

The Court: I understand.

The Witness: $11.65 per thousand feet cost of running it through the box factory, and the shipping expenses, $.97 per thousand, and then because we didn't get the full 8,828,644 feet in shook, we had an under run of 191,670 feet to figure down to 8,636,974 produced in box shook, that cost $1.03 per thousand more than the under run cost normally—normally it happens in a box factory you have an under run, the resawing and waste that occurs in developing box shook that adds up to a total then of $53.51 per thousand to get the lumber through the box factory, and loaded on the car, and sold.

Q. (By Mr. Levitt): Pardon me, may I check one of those— [17] two of these figures, the total was—— A. (Interrupting) $53.51.

(Testimony of Frank Momeyer.)

Q. (By Mr. Levitt): And the shipping expenses were what?

A. The shipping expenses alone?

Q. You said you took the items, and adding the cost of manufacture, you had another item of shipping expense.

The Court: $.79 per thousand for shipping, loading in the cars.

Mr. Levitt: Then you had an under run $1.03 and a total of——

A. (Interrupting) $53.51, if I correctly quoted the figures here.

Q. (By Mr. Whittaker): What was the actual receipt for that lumber as sold per thousand foot?

A. $60.22 per thousand.

Q. The difference between the $60.22, the selling price received, and the $53.51, is $6.71, is that right?

A. That is right.

Q. $6.00 times 8,828,644, is $59,240.93, is it not?

A. That is right.

The Court: What was that last figure?

Mr. Levitt: Er——

Mr. Whittaker: $59,240.93.

Q. (By Mr. Whittaker): And that is the amount of recovery from the box factory operation, shown in what schedule of the [18] claim of the proof of loss, Mr. Momeyer?

A. It is summarized on page 20 of the proof of loss, schedule R3II, and then on page 21 the details that make up the $59,000.00 as given under R2III.

(Testimony of Frank Momeyer.)

Q. And now, Mr. Momeyer, following the operation through very briefly, the skeleton—I can do it some other way for my purposes—the lumber at the end of the green chain, which is the green sorter behind the mill, after the lumber comes to the mill, being diverted at that point to the manufacturer of box shook, or channeled into any avenue that takes it to the planing mill for finish and sale, as lumber, would it be true the cost for producing that lumber to the end of the green chain would be the same in either case——

Mr. Levitt: (Interrupting) Just a moment, counsel, you are talking about the same piece of lumber in the green chain asking whether the cost of, up to the point would be the same whether you moved or left it in the planing mill, or right in the box factory——

Mr. Whittaker: (Interrupting) Whether every piece of lumber up to that point cost you exactly the same per foot.

Mr. Levitt: Whether you moved it or left it right there—I will object to the question on the grounds it is argumentative and calling for the conclusion of the witness, it is so obvious a piece of lumber is produced, your Honor, if the cost at that point doesn't—whether he intends to move it left or right, obviously that is what the question means.

The Court: It seems that way to me, I will allow it to be answered. I am not certain on the argument.

Mr. Levitt: Is that what the question means?

(Testimony of Frank Momeyer.)

Mr. Whittaker: That is exactly what it means, I think I shall withdraw it, the man is obviously not an expert.

Q. (By Mr. Whittaker): And now——

The Court: (Interrupting) One piece of lumber might cost more than another piece.

Mr. Levitt: That is another question.

Q. (By Mr. Whittaker): Mr. Momeyer, did Pickering Lumber Corporation have any subsidiary corporation that own anyone of these functions up there, or was it all owned and operated by one corporation, Pickering Lumber Corporation, the defendant?

A. All owned and operated as one unit, Pickering Lumber Corporation, the logs, sawmill, complete operation under one ownership.

Q. I think I neglected in our examination yesterday, to ask you why it was you said that normally your logging operations begin before April 15th to May 1st, and continue to about November 30th, I believe you said—why is that, was that your answer?

A. Our timber supply is located in the High Sierras, and during the winter months it is impossible for us to conduct logging operations because of snow and general winter conditions, therefore, we are shut down until—shut down in the fall about November 30th, and cannot start again [20] operating until around April 15th or May 1st.

Q. Getting back to the box factory operation for

(Testimony of Frank Momeyer.)

a minute, were you able to continue even though you used some higher grade of lumber in the manufacture of box shook, in the box factory operation at the end of the nine months loss period of April 7th, 1946?

A. Not quite. We had lumber to run until March 16th, 1946.

Q. What do you mean, we had lumber to run, you ran out of lumber?

A. We ran out of lumber at that time and had to shut the box factory down.

Q. By the way, in referring to this long depreciation did you invite the plaintiff insurer to participate in these tests that were made to determine the extent and period of the occurrence of depreciation?

Mr. Levitt: I object to the question on the grounds it is irrelevant, and incompetent, counsel is attempting to prove what these experts found in a sense, whether correct or not, he isn't raising the particular point as to their correctness—it is not involved in the issues of this case, could only be a relevant admission of the insurer with regard to correctness of these things, and even at that it would be very weak on that point, I am not sure it would be an admission if they were correct, the insurance company is under no obligation.

The Court: I think I will let the question be asked. [21]

The Witness: We did invite the insurance company to come up while the test was being made, and

(Testimony of Frank Momeyer.)

participate in it, and watch the work that was being done.

Q. (By Mr. Whittaker): Did they do it?

A. They did not.

Q. Did they advise you why?

A. They said they were not interested.

Mr. Levitt: Just a moment——

Mr. Whittaker: (Interrupting) That is right, I will withdraw it.

The Court: The answer will go out—his answer to the last question.

Mr. Whittaker: Mr. Clerk, will you please mark this as Exhibit 3.

(The Clerk marks specified document Exhibit 3.)

Q. (By Mr. Whittaker): Did the auditors and accountants for plaintiff's insurance company have access to actually examine the books of the Pickering Lumber Corporation April 1st?

A. They did.

Q. Mr. Momeyer, I hand you what has been identified as Defendant's Exhibit 3, and ask you if you can state what that is?

The Court: Have we got that——

The Clerk: (Interrupting) Just for identification.

The Witness: This is a memoranda to the appraisers written by Mr. K. W. Whitters and Mr. W. M. Ball, adjustors for [22] the insurance com-

(Testimony of Frank Momeyer.)

pany, and pertaining to the appraisal under the policies that Pickering held.

Mr. Whittaker: I will offer this in evidence as Defendant's Exhibit 3.

Mr. Levitt: May it please the Court, I don't have any particular objection to the offering, but I don't quite see how counsel can offer it through this witness, I assume you are intending to show that a copy of the memoranda was submitted — Mr. Momeyer testified was submitted to the appraisers in the course of the award, and a copy was sent to Pickering, is that correct?

The Court: Not only for that purpose, also showed content and instructions.

Mr. Whittaker: That is exactly correct.

Mr. Levitt: I am not speaking of the purpose, I want to be clear to the scope of identification.

Q. (By Mr. Whittaker): Was this memoranda or a counterpart of it delivered to the appraisers?

A. It was.

Q. This, of course, was the same Mr. W. C. Whitters and W. M.——

Mr. Levitt: (Interrupting) We will stipulate Mr. Whitters represented the insurance company in the course of the adjustment.

Mr. Whittaker: And Mr. Ball likewise?

Mr. Levitt: Mr. Ball was acting with him. [23]

Mr. Whittaker: That will be all, you may cross-examine.

(Testimony of Frank Momeyer.)

The Court: We will take a short recess for five minutes.

Certificate of Reporter

I (we), Official Reporter(s) and Official Reporter(s) pro tem, certify that the foregoing transcript of 24 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ GEORGE WHEELER,
By /s/ ELDON W. RICH.

[Endorsed]: Filed March 6, 1950.

Cross-Examination

By Mr. Levitt:

Q. Mr. Momyer, I take it that in your position as treasurer, you are quite familiar with accounting and accounting principles and so forth, are you not?

A. Well, I deal with them at considerable length.

Q. Have you had any accounting training?

A. Yes, sir.

Q. Have you ever practiced as an accountant?

A. I worked for a short time with a public accounting firm, in my younger days.

Q. And then you are familiar, are you not, with accounting principles and practices, in general, as

(Testimony of Frank Momeyer.)

well as in the lumber business in particular, isn't that so? A. I think so.

Q. Now, did you prepare this claim that has been introduced in evidence in the form of a proof of loss—may I have the pleadings for a moment? I didn't hear your answer if you did answer.

A. I made the preliminary claim, and when it became evident that we had to file a proof of loss we asked our public accountants Robinson & Nowell & Company to prepare the claim in its final form.

Q. Robinson & Nowell & Company were the regular C.P.A.'s firm that the Pickering Lumber Company had used for many years, were they not?

A. That is correct. [2]

Q. So that the testimony that you gave with regard to items shown in the proof of loss, which is Plaintiff's Exhibit D, was based primarily upon the fact you found the report of Robinson & Nowell to be correct, is that so?

A. That is so, it agreed with the preliminary report that we made—in general.

Q. With regard to this memorandum, do the appraisers that you spoke about, or identified as having been filed by Mr. Withers—did the Pickering Lumber Company file any reply to that memorandum?

A. Not a reply, they did file with the appraisers the brief—I believe Judge Barnett filed a brief.

Q. That brief, as a matter of fact—however, was

(Testimony of Frank Momeyer.)

filed before this memorandum of Mr. Withers, was it not?

A. I am not sure as to the timing because they were both filed with the appraisers—when they received them I do not know.

Q. In order to refresh your recollection, I call your attention to the last portion of the first paragraph of Defendant's Exhibit No. 3, which you have just identified, that memorandum that Mr. Withers filed with the appraisers——

A. (Interrupting) Which is undated.

Q. As is the brief that Pickering filed also. I read a sentence—"We therefore request that the appraisers consider the briefs by Mr. Paul Barnett and Harrington, attorneys for Pickering Lumber Corporation, which may or may not assist in the [3] arriving at the value of the loss." I will ask you if that refreshes your recollection as to whether or not the brief that you spoke about having been filed by Pickering was filed before or after this memorandum which you identified.

A. I would say from the reading of that memorandum it would appear it was.

Q. It was filed before?

A. It was filed before, I do not know that, I didn't have the documents.

Q. As a matter of fact, these briefs were both filed after the hearings of the appraisals were concluded, isn't that correct?

A. I believe that is correct.

(Testimony of Frank Momeyer.)

Q. So far as you know, the only presentation made to the appraisers by Pickering Lumber was after the hearing—was the one legal brief that is referred to in Defendant's Exhibit 3, isn't that so?

A. Until late in the appraisal work, that the appraisers were doing, I believe that they did finally ask for some further information which we gave them.

Q. Outside of furnishing some additional facts with respect to figures, there was no other statement or brief filed on behalf of Pickering Lumber, other than the single brief referred to in Mr. Withers' memoranda, isn't that so? A. That is true.

Q. Now, Mr. Momyer, I am going to show you a letter which [4] appears to bear your signature, dated October 10, 1945, addressed to the Fire Companies Adjustment Bureau, on the letterhead of the Pickering Lumber Corporation, to which is attached several mimeographed sheets, five to be exact, and ask you if you can identify this as a letter which you wrote, and sent to Mr. Withers of the Fire Companies Adjustment Bureau, on or about that date.

The Court: What was that date again?

Mr. Levitt: October 10, 1945.

A. I think that is true, this letter is not regarding new period and old period insurance.

Mr. Levit: I will ask the Court to ask the witness to confine his answers to the questions. You do identify that as a letter you wrote?

(Testimony of Frank Momeyer.)

A. That is right.

Q. I may say primarily—I will ask one more question. The fire that is referred to in that letter is the same fire we are talking about, involved in this case, is it not? A. That is right.

Mr. Levit: We offer this letter in evidence with the attachment referred to in the letter and ask that it be marked Plaintiff's Exhibit next in order.

Mr. Whittaker: The purpose is not clear to me; if it relates to a fire claim under fire insurance policy I would inquire what is the purpose, to know whether or not it has any relevancy. [5]

(Thereupon followed a short argument by Mr. Levit.)

The Court: I will admit it.

Mr. Levit: That will be Plaintiff's Exhibit I.

Q. Now, Mr. Momyer, it is a fact, isn't it, that Pickering Lumber Corporation had certain policies of insurance, which covered the physical loss to certain lumber which had been destroyed in the fire——

The Court: (Interrupting) Is that Plaintiff's Exhibit I?

The Clerk: That is right.

Q. (By Mr. Levit): It is also true, is it not, that Mr. Withers on the part of Pacific Coast Adjustment Bureau—his name is not mentioned, Mr. Ball's name is mentioned, Mr. Ball and Mr. Withers of the Fire Companies Adjustment Bureau, were adjusting that loss on that insurance, isn't that so?

(Testimony of Frank Momeyer.)

A. They were.

Q. And of course in arriving at the amount due under that insurance, it was necessary to ascertain, was it not, the appropriate price or value to be placed upon the lumber that was destroyed?

A. For those policies, yes, the value of the lumber was concerned.

Q. Now, I will read the letter, if the Court please. It is very short.

"Fire Companies Adjustment Bureau, Inc., 300 Montgomery Street, San Francisco, California, Attention: Mr. W. Ball. [6]

"Dear Sir:

"We are attaching hereto two copies of a statement showing a stock loss of $3,544.74, as a result of the sawmill fire on July 7, 1945.

"We believe this statement is self-explanatory, but if there is anything that is not clear we will be glad to give you further information upon request.

"Yours very truly,

"Pickering Lumber Corporation

"By F. F. Momyer."

Attached to that is a mimeographed statement, the first page of which is headed Recapitulation Insurance Declaration Values, and then following a listing by footage and by price of the lumber in the green chain and of the lumber inventory reconstructed.

Now, I would like to ask you, Mr. Momyer,

(Testimony of Frank Momeyer.)

whether or not all of the lumber lost in that fire was on the green chain, or whether some of it was in inventory.

A. All of it was on the green chain.

Q. It was necessary, however, in order to arrive at your figures to bring into calculation the lumber in inventory?

A. I don't think—we make an inventory statement at the end of each month, and that was probably submitted along with this.

Q. Well, the reason I asked you—you notice page 1 headed Recapitulation which is attached to your letter, deals not only [7] with the green chain lumber but also with the inventory.

A. Well, this was an insurance declaration on all of the lumber we had on hand, and might have been for the purpose of determining any company's insurance in excess of the other's claim.

Q. Now, in valuing the lumber in that declaration, of course it was necessary to state—for you to state its true value or the value in place, was it not?

A. We submitted nothing to the insurance company except a value of $2,500,000 — or $2,000,000, whatever it might be, and in our calculations in arriving at that amount we do have to use some basis for it.

Q. That basis you used was the market value, or the value in place, is it? A. That is right.

Q. Actually you determined that market value, and the value in place on the basis of the O.P.A.'s price, do you not?

(Testimony of Frank Momeyer.)

Mr. Whittaker: Just a moment. I will object to the question as calling for a conclusion, and as opposed to the law——

Mr. Levit: (Interrupting) Never mind the law. We are talking about an admission made by the defendant.

Now as to the value of the lumber——

The Court (Interrupting): I will allow the question to be answered.

A. At that time, at the time the fire occurred we did use that basis because we had no other basis. [8]

Q. (By Mr. Levit): Now, pardon me, I would like to pursue that a little further. You mean prior to the fire you didn't have the figures on which to determine the average cost of all lumber produced by the mill?

A. We are not talking about average costs here.

Q. You said you had no other basis for determining a valuation.

A. Valuation is correct; under the fire policies we needed to determine valuation of physical property loss; in U. and O. insurance we talk about the profit.

Q. We won't argue that, but the fact of the matter is you did have not only the OPA's price available at the time you were computing this figure, you had your average cost figure available, did you not? It was also available?

A. They were available, but not concerned in the computation.

(Testimony of Frank Momyer.)

Q. Now, Exhibit A attached to Plaintiff's Exhibit I is also entitled a Recapitulation of Stock on Green Chain as of 5:00 p.m. July 7, 1945, that is the date of the fire, wasn't it?

A. That is right.

Q. And I will call your attention to these figures showing the footage, as showing the values, and I will ask you if it is not a fact that those figures were made on the basis of OPA's price.

A. They are, less incurred expenses of moving the lumber from the green chain to the shipping dock.

Q. Now, I will call your attention also to the fact it says at about the middle of the page At Estimated Freight Differential [9] Gain Pine only so many feet at 69 cents. You notice that?

A. That is right.

Q. Now, that represented, that 69 cents represented, did it not, Mr. Momyer, the freight differential on an average which the Pickering Lumber Company made or anticipated to make on the sale of lumber, under the OPA?

A. That is right; the OPA regularly allowed the freight difference.

Q. In other words, what that means is that this shipping of the lumber away, you priced f.o.b. on the OPA basis, f.o.b. a certain point, and therefore if you were shipping a greater distance than average you would make the freight differential——

A. (Interrupting): That is right.

(Testimony of Frank Momyer.)

Q. What you made was 69 cents, wasn't it?

A. On this particular number I believe that is correct.

Q. By the way, do you know how much the award allowed for freight differential?

A. No, I do not.

Q. Following the line about the freight differential, I call your attention to a statement less deductions for in place value, and then follows a list of certain costs and so forth, and I ask you again if it is not true that in place values were calculated by Pickering Lumber Corporation at the OPA price. A. That is right.

Q. Now, at the bottom of that page, I read to you this [10] statement, "Items priced on current rough f.o.b. mill prices plus estimated freight gains in same manner as regular monthly inventory pricing." That is a correct statement, isn't it?

A. That is correct.

Q. And when you referred to rough f.o.b. mill prices you are referring to OPA prices, aren't you, the ceiling price fixed by OPA?

A. At the time that that statement was made, yes, sir.

Q. As a matter of fact, the statement is correct also in regard to its stating that that was your basis at that time, and had been your practice of pricing your regular inventory in the yard.

A. Under these fire insurance policies.

Q. Pardon me, you misunderstood my question.

(Testimony of Frank Momyer.)

I wasn't referring to the fire insurance policies at all. I am asking is it not a correct statement here that these prices, these values stated here were calculated in the same manner you calculated the values in your own inventory every month, isn't that so? A. That is not correct.

Q. That is not correct? A. It is not.

Q. How did you value your inventory?

A. On our cost basis, and our books—this statement is made particularly for insurance purposes and deals with values, not costs. [11]

Q. Isn't it a fact, I want to be clear with you, Mr. Momyer, that when I talk about cost basis or when you talk about cost basis, we are going to clarify one point—when you mentioned cost basis you meant average cost, didn't you?

A. Yes.

Q. Now, then,——

A. (Interrupting): Actual cost if you want to call it that.

Q. As an accountant, you have heard the expression allocated cost, haven't you?

A. I have.

Q. So that I think—in order to be perfectly clear, when you are referring to an average cost, please say so and I will do the same. We won't just talk about a cost basis.

A. Neither average cost or allocated cost has anything to do with the subject we are talking about now.

(Testimony of Frank Momyer.)

Q. That may or may not be true. As I understand your testimony now to be that Pickering's books—prices this inventory, the inventory so far as the books were concerned, and values them on an average cost basis.

A. That is right, until the end of the year when we make a computation for income tax purposes, because we are forced to do so, for the Revenue Department we adjust our books to reflect that difference, our books each month showed on an average cost.

Q. In other words, it is true, is it not, some months—in fact, some years before the fire you were required by the Internal [12] Revenue Department to place your inventory on an allocated cost rather than an average cost basis?

A. For income tax purposes, about 1943, I think it was.

Q. Will you then explain to me why, if you did not regularly price your inventory at OPA prices, plus 69 cents freight differential, why you made that statement in this Exhibit A which I just read to you. "Items are priced on current rough f.o.b. mill prices plus estimated freight gain in the same manner as regular monthly inventory pricing."

A. That has nothing to do with the question you asked me. You asked me if we carried inventory on the books, on OPA price basis. We do not, this statement is made for insurance coverage purposes on our stock and therefore is so priced at the value

(Testimony of Frank Momyer.)

of lumber, but we make no entry in our books to reflect this price at all at any time—this is purely an insurance coverage statement.

Q. What do you mean, same manner as the regular monthly inventory price?

A. Regular monthly inventory price for this insurance purpose, for these policies—in other words, the loss we claimed under these policies was computed on the same basis we reported each month to the insurance company for value purposes.

Q. In other words, then, so far as the calculated in place values are concerned, you always use OPA prices for insurance purposes and your purposes, didn't you? [13]

A. Not for inventory purposes or cost purposes.

Q. It is your testimony you did not use OPA prices in your accounts for company's purpose at all?

A. Except on a computation we make for management information regarding the box factory and that is washed out in our profit and loss statement, it is purely information.

Q. We will come back to that. It is in fact, is it not, that the books do show then the in place value when you calculate the profits of the box factory, show the in place value of the lumber at OPA prices, right?

A. For that supplemental statement, yes, sir.

Q. Now, continuing with this Exhibit A and coming to the table which is listed here of the stock

(Testimony of Frank Momyer.)

on the green chain, this I take it is the breakdown of what we have just been talking about, showing each grade with OPA ceiling price, the number of feet and figures to show the value, is that right?

A. That is correct.

Q. No, in each case the value that you stated in that third column is obtained by multiplying the number of feet by the OPA price, isn't it?

A. That is correct.

Q. I am going to call your attention to certain items on there, look at No. 3 on page 3—I have numbered those pages in pencil at the bottom, that is the third one.

Mr. Whittaker: This is still Exhibit I? [14]

Mr. Levit: Yes—page 3, item 3, have you got that—600 feet?

A. Yes.

Q. Is that box lumber? A. I think so.

Q. The ceiling price is $27.50, isn't it?

A. That is right.

Q. Look at item 4, the following item, is that box lumber? A. I think so.

Q. And the price, the ceiling price is $31.25, shown there, isn't it? A. That is right.

Q. Item 7, is that box lumber?

A. I think so.

Q. And so, if we follow right down there—this exhibit, and take all of the items that have types of grading after them which, as you say, indicates that is box lumber, we find that the price shown, the

(Testimony of Frank Momyer.)

OPA price shown, runs from $27.50 up to and stopping of $31.25, don't they?

A. I think so, there is no question about that on this particular lumber.

Q. It is also true, isn't it, that many of the items on those sheets, that show a lower ceiling price than that, in other words, some of them go much lower than that, don't they? A. Yes. [15]

Q. And of course in your high grade they run as high as $81 a thousand feet, correct?

A. I see an item of 81, I am not sure that is the highest one, I expect it is.

Mr. Whittaker: In that respect you are not talking about high grade box lumber.

Mr. Levit: I am talking about lumber above $81.

Q. (By Mr. Levit): Now, Mr. Momyer, I will show you a letter dated October 11, 1949, also addressed to the Fire Company Adjustment Bureau, this time to the attention of Mr. Withers, in which reference is made to certain attachments or certain exhibits which pages I have numbered 7, 8, 9 and 10—in other words, I have numbered them consecutively as I did with that letter of October 10. I will ask you if you can identify this letter as one that you wrote, and the attachment as those that were attached to that letter, when it was sent.

A. Yes, I remember this letter.

Q. And that letter, like the previous exhibit, was written, was it not, in connection with the loss

(Testimony of Frank Momyer.)

of lumber arising in the same fire we are talking about?

A. Yes, the property damage fire—loss of U. and O.

Mr. Levit: We offer this as Plaintiff's Exhibit J.

Mr. Whittaker: Your Honor, we will make the same objection as before, I think they are not germane, there are a number of such letters, and as to any issue here, it seems to me that they [16] seek to invade and include the very question Your Honor will ultimately be called upon to decide, it seems to me it is a question of whether the OPA price used by the appraisers is a proper price—not a matter of law—whether some other price might have been appropriate, the question is whether or not there was an error of law made by the appraisers beyond their jurisdiction——

(Thereupon an argument was made by Mr. Levit.)

The Court: I will allow the question.

Mr. Levit: Now, I will read the letter to Mr. Withers written the day following the previous letter.

"Dear Mr. Withers:

"We are attaching hereto a statement showing the total footage and the 'in place' value of our lumber inventory as of July 7, 1945, the date of the loss of our sawmill by fire.

(Testimony of Frank Momyer.)

"You will note that we have started at the estimated rough market value of this lumber, f.o.b. cars and from this amount we have deducted unincurred expenses, such as shipping and selling costs and estimated overhead, handling costs, et cetera, to arrive at the estimated net 'in place' value of the lumber at the time of the fire. I believe that ample footnotes have been made, so that you can check our method of arriving at the 'in place' values, et cetera, however, if you have any questions regarding our calculations, we will, of course, be glad to give you further information [17] upon request."

Q. Now, Mr. Momyer, these in place values that you speak of there were computed, were they not, throughout the exhibit which is attached to this letter, on the basis of an OPA ceiling price?

A. That is right.

Q. That was the way that you made your calculations, with respect to the entire inventory of lumber that had gone through the box factory, that had gone through the sawmill and that was on hand at the time of the fire, on July 7?

A. Yes, that computation was not made for U. and O. claims, however.

Q. We understand that, but the fact is those prices in your opinion did represent the in place value of the lumber at that time, isn't that so?

A. They represented the only basis we knew

(Testimony of Frank Momyer.)

how to put on them for the purpose of physical property loss.

Q. Mr. Momyer, you did not in your letter tell the insurance company that these figures might not be the in place value, you said these are the in place values, did you not?

A. On the basis calculated.

Q. You believed them to be in the in place value at that time, didn't you?

A. I think so, for this purpose.

Q. And you say for this purpose, you are referring to the mere [18] purpose of adjustment of the physical loss on lumber? A. Yes.

Q. Isn't it a fact you used exactly the same basis to determine in place value and to determine market value, and in calculations made in connection with determining the profit of the box factory?

A. No, we made a supplemental statement, as I explained to you before, for management purposes, and when we go into our profit and loss statement whether it be auditors or our own accountants, we go to the profit and loss statement and take off the difference between the sales price and the cost, and arrive at the profit, and we pay no attention to the in place value.

Q. I think we will come to that later. Now, then, the calculating the value of your inventory, you end up with what you call on this statement, an estimated net in place value, is that correct?

A. That is right.

(Testimony of Frank Momyer.)

Q. And this estimated net in place value, so that we will be perfectly clear, is based upon the OPA ceiling price, isn't it? A. That is right.

Q. That goes for all of the lumber that you had on hand, your entire lumber inventory, is that right?

A. For the purpose of this insurance policy, yes.

Q. Incidentally, will you show me in this exhibit, or in the [19] prior Exhibit I, any place where you told the insurance company that these values on which you expected them to adjust the loss were merely calculated for the purpose of adjustment and did not represent its true value.

A. I have nothing on this statement to that effect, the physical property insurance policy required we submit a value statement, and we had to submit something.

Q. You didn't qualify it in the submission, did you? A. We had no reason to.

Q. Again on this exhibit, I call your attention to the fact that you have placed a note, at estimated freight differential again on 11 million-odd feet of lumber, at 69 cents, you see that?

A. I think that is right.

Q. And that was then over your entire inventory, by and large, with the exception of perhaps two million feet, what you calculated to be your average freight differential again?

A. Yes, because we shipped a lot of lumber to the East, a higher grade lumber to the East, and

(Testimony of Frank Momyer.)

a lot of that—we have very little gain—freight gain.

The Court: That is the same 11 million feet as testified to before?

A. No.

Q. (By Mr. Levit): Let's be sure about that, I am not sure myself—this inventory shows a total footage off hand of 13,900,000 feet, doesn't it? [20]

A. That is right.

Q. That was of July 7, wasn't it?

A. I think so.

Q. That is what you had on hand at the time of the fire, isn't it?

The Court: 14,000,000 feet?

A. I call your attention to the fact that sixteen million—753 total——

Q. (By Mr. Levit, interrupting): Just a moment. We will get this straight in a moment—then you also had some additional lumber which you called plant lumber, which brought it up to sixteen million some-odd feet?

A. That is right.

Q. The lumber you had on hand at the time of the fire is correctly shown in this inventory, isn't it? A. I think so.

Q. The 11,000,000 feet, if I am not mistaken, was logs, wasn't it?

Mr. Whittaker: That is correct, 11 million some odd feet of logs brought in after the fire.

(Testimony of Frank Momyer.)

The Court: 11 million feet altogether brought into the mill after the fire?

Mr. Levit: ——(Thereupon a statement by Mr. Levit was given to the Court.)

Q. (By Mr. Levit): Now, just—I don't think it is important, [21] but just to clarify, if you can, where did the figure of 11,800,000 come from—we are talking about freight differential at 69 cents.

A. Some of it, you wouldn't make any freight gain on at all.

Q. Which you eliminated from these last two items?

A. We wouldn't have anything to sell—it is 2,800,000, this would be used elsewhere—we figured we would sell the 11,000,000 feet on the market.

Q. Now, you came out in this statement with an estimated net in place value of $34.43 per thousand, did you not?

A. Well, we came out with that, yes, that is the figure.

Q. And of course, that is over all grades, isn't it? A. That is right.

Q. Highest to the lowest, then you made certain adjustments for your plant use lumber, cash discount, and for your D grade estimate and waste estimate, you came out with a final net in place value of $30.83 per thousand, over all, didn't you?

A. That is right.

Q. Suppose you hold this exhibit a minute, I want to refer to my notes. Now, in footnote B on

(Testimony of Frank Momyer.)

that same page—the first page attached to Exhibit J, you make the statement, priced at rough f.o.b. mill price, correct? A. That is correct.

Q. Those are OPA prices, aren't they?

A. Yes, sir. [22]

Q. You have reference to? A. Yes, sir.

Q. In footnote D you speak of freight differential, right? A. Yes, sir.

Q. And you say—may I see that a moment—and you say current pine ceiling permits computation of delivered prices to California destinations on Susanville, California, rates of freight. This freight differential gain has been averaged and so forth and applied to this inventory valuation as shown that figure, the average was that 69 cents we have referred to, wasn't it?

A. That is right.

Q. Now, I would also at that point like to read to the Court the first paragraph on page 7, page number 7 of the attachment to Exhibit J, top of page No. 1-A.

"Our fir is sold under Douglas fir ceiling no. 26 prices permitting us to compute delivered prices to California destinations only, on a Portland rate of freight. Average freight differential gain on all fir lumber shipment has been added to inventory valuation of fir lumber items, we ship to California destinations and average f.o.b. mill realization of fir lumber items we ship outside the State of California and so on."

(Testimony of Frank Momyer.)

Now, again on this next page which is No. 8 at the bottom, we come to your lumber inventory—a statement of your lumber inventory by grade as of July 7, 1945. Now, that doesn't give [23] the price per thousand feet, but it does again show at the bottom an additional estimated freight differential gain of 69 cents, doesn't it?

A. I think so.

Q. I will call the Court's attention to the fact on Schedule A of the inventory page 9 of this exhibit at the bottom is the footnote.

"Above estimated shipping and selling costs based on our experience for the fiscal year April 1, 1944, to March 31, 1949."

Your fiscal year, Mr. Momyer—Pickering's fiscal year ended March 31, didn't it?

A. That is right.

Q. And that was agreed, was it not, in the adjustment of the U. and O. loss, that the experience of the year—the fiscal year ending March 31, 1945, would be used as the base year for the purpose of calculating the use and occupancy loss.

A. I believe that was agreed by all parties.

Q. And then the final page, which is No. 10 of this exhibit, speaking of certain additions to the valuation for the surface stock in the inventory—I assume—I will ask you, rather, I shouldn't say assume, I don't know. Is it a fact that this surface stock refers to stock run through the planing mill?

A. That is right.

(Testimony of Frank Momyer.)

The Court: Mr. Levit, it is 12:00 o'clock and we will now [24] take the noonday adjournment until 2:00 o'clock this afternoon.

(The noon recess was taken until 2:00 o'clock P.M.) [24-A]

Afternoon Session, Wednesday, June 9, 1949, 2:00

By Mr. Levitt:

Q. Now, Mr. Momyer, before we get too far away from your testimony on direct examination, I should like to ask you, having it in mind—whether it is not a fact that all of the points and arguments that were brought out in connection with these various items on your direct questioning by Mr. Whittaker were also brought out in the appraisal, and were presented by your company, or by yourself to the appraisers.

A. I am not sure that all of them were, I think substantially that they were.

Q. Do you recall any matter of fact that you testified to this morning that was not presented to the appraisers, or yesterday?

A. I can't say that I do.

Q. Now, I am going to show you a letter dated July 1, 1946, on the stationery of the Pickering Lumber Company addressed to Mr. Withers, and signed by yourself for Pickering, making reference to a tentative business interruption claim to which are attached certain documents, referred to in the

(Testimony of Frank Momyer.)

letter as schedules, and I will ask you if you wrote that letter and sent those inclosures to Mr. Withers, at about that date.

A. Yes, sir, I did.

Mr. Levit: We will offer this letter in evidence and ask that it be marked Plaintiff's Exhibit K.

The Clerk: Plaintiff's Exhibit K. [25]

Mr. Levit: The letter K—Exhibit K will include the letter and the documents attached which have been identified by the witness, will you clip them together—I should say that there are on these attached pages certain pencil notations which I do not intend to offer, I have no idea who made them, but I am not introducing the pencil marks.

The Court: The document exclusive of the pencil markings.

Mr. Levit: "Dear Mr. Withers:

"In accordance with your request, we are attaching hereto our tentative business interruption claim resulting from the loss of our sawmill by fire on July 7, 1945. This claim has been prepared by Robinson, Nowell & Company, and is made up of the following schedules: No. 1, summary of all items included in our tentative claim, 824-some-odd dollars. Certain comments regarding the general construction of our claim are also included in this schedule.

"2. Net profits presented in 266,047.31. The basis for the calculations used in this schedule are explained in general in the summary schedule 1 re-

(Testimony of Frank Momyer.)

ferred to above. You will note that Robinson, Nowell & Company have shown lumber sales and box shook sales separately in their schedule. However, we do not on our books make any attempt to show actual profit from any particular department of our operations. We consider that our plant, logging operations, et cetera, are all one integrated operation and we are interested in the overall [26] profit from the entire operation. This is the basis on which our insurance coverage was placed.

"No. 3. Expediting an Extraordinary Cost. $21,648.10. Comments regarding this schedule are also included in the summary schedule 1 referred to above. We note that Robinson, Nowell & Company have not considered items applying to this schedule for the period of April 1 to April 7, 1946, inclusive. According to our records, this would add about $448.82 to our tentative claim.

"No. 4. Depreciation. $231,506.46. This amount represents the continuing depreciation claimed for 75 per cent of the 365 days following the fire and we believe the schedule presented is self-explanatory.

"No. 5. Overhead, Continuing Costs, Etc. $305,-763.66. We believe this schedule is presented in sufficient detail to enable you to check all of the items making up the $305,763.66. We call your attention to the comment that is made by Robinson, Nowell & Company in their summary schedule 1 referred to above.

(Testimony of Frank Momyer.)

"It is our understanding that this tentative claim is being submitted without prejudice and that we may thereafter make such revisions, additions, or adjustments, that we believe to be in order. We believe this is in accordance with our agreement with you when you were in our office during the early part of June, and discussed with us the presentation [27] of our claim, et cetera. We have not included in our tentative claim any schedule of partial operations because we do not at this time know what dollar value should be assigned to the liability that you may have for the replacement of our inventory of raw stock used in the box factory during the period of July 1, 1945, to March 26, 1946. Likewise, we do not know the dollar value that should be assigned to the sustained loss on logs that were in the pond or on the ground in the woods at the time of the sawmill fire. We do not believe, however, that the amount of our claim will be materially affected when all of these factors are considered."

Q. (By Mr. Levit): Now, Mr. Momyer, you submitted the letter and these figures, did you not, in presentation of Pickering's claim under policies that are here in suit? A. That is right.

Q. I call your attention to the statement 1 of the statement which I just read, "We have not included in our tentative claim any schedule for partial operations because we do not at this time know what dollar value should be assigned to the liability

(Testimony of Frank Momyer.)

that you may have for the replacement of our inventory of raw stock used in the box factory during the period July 8, 1945, to March 6, 1946, do you recall so stating in this letter?

A. That is right.

Q. That has reference, does it not, to the ascertainment of the [28] profit on the box factory operation? A. That is right.

Q. The post-fire operation?

A. It has particular reference to inventory we felt we should not have to use in this partial operation because it could not be replaced. From the very beginning we discussed the possibility of using lumber we had on hand that belonged to us, and could not be purchased on the market. We saw it wouldn't be fair for us to use all of this lumber up and have to shut our box factory down, and would be unable to operate at the time the sawmill started, we wouldn't have any lumber on hand. The adjuster at that time mentioned inventory replacement—would allow us inventory replacement. We used 8,826,000 feet of lumber for boxes, and I believe it was our understanding we would be allowed credit for some of that footage, on the theory we should be allowed that lumber to start our box factory again, when the sawmill resumed operation. No one ever told us what was meant by inventory replacements in dollars and cents. We do have a basis on which to make such a calculation, since our claim for the 9 per cent—or $842,000, and the insur-

(Testimony of Frank Momyer.)

ance was $641,000, it seemed unimportant to this tentative claim, therefore we put in nothing for it but stated some calculations would need to be paid eventually, if a subsequent adjustment was found to be in order.

Q. As a matter of fact, as far as that claim was concerned, you [29] didn't put in anything for the salvage of the profit on the box factory operations at all, did you?

A. We couldn't at that time, determine definitely what it was, as I recall. That would be part of the salvage, and we couldn't determine that then—we could not determine the true salvage that would be allowed for the box factory operations.

Q. As a matter of fact, you filed your proof of loss, Mr. Momyer, did you not, and calculated the box factory profit, put in the entire eight million odd feet of lumber—it went through there?

A. We took back credit for about $16,000.

Q. About two million feet?

A. About two million, I have it here as 2,720,-000 feet.

Q. The company conceded that figure, did they not, the two million feet you were entitled to to get the box factory started again?

A. I do not believe that they did concede it, as said before, they did not give us any formula by which such calculations could be made. We made our own calculations—and I think they made one of their own also, on a different footage basis. [30]

(Testimony of Frank Momyer.)

Q. And now, that is, of course, not involved in the question of box factory profit we are discussing here, is it?

A. Only to the extent that it in effect reduces that profit, because you wouldn't be considering as much footage as we have talked about heretofore.

Q. And that reduction of the profit when taken into consideration by the appraisers and allowed in the award, wasn't it?

A. Yes, not in the dollars amount as stated here in the proof of loss, but they did take that into consideration, the inventory replacement, and allowed some credit for it.

Q. And now, referring to the attached document to this exhibit, I will read briefly from the general statement that is attached.

"Profit Presented"

"It is believed that the preceding fiscal year, ended March 31, 1945, is the measure of the results which, but for the fire, would have been shown during the year ended March 31, 1946. The insured is prepared to demonstrate, if desired, that its cutting program for F.Y.—3/1/46, was very similar to that of F.Y. 3/31/45, and was expected to produce quantities of logs, by species and by grade, in every way comparable to those actually produced in F.Y. 3/31/45."—Is that correct?

A. That is correct.

Q. That was the assumption both parties used—the appraisers used all the way through this appraisement, wasn't it? A. Yes. [31]

(Testimony of Frank Momyer.)

Q. Now, actually you did not carry over normally any log inventory from one season to the next? A. Not any log inventory, no.

Q. In other words, as I understand it, your logging commences about the 1st of May or the middle of April—you begin to log. At that time, your mill which had been shut down during the preceding winter under normal circumstances begins to operate, as the logs begin to come in?

A. That is right.

Q. Then the mill would continue operation, and logs would continue to come in until you said about the end of November, when the snow set in?

A. Usually about that date.

Q. And then your mill would continue to run for a short period after that, to cut the logs that had been brought in in that season, the balance of them—then the mill would shut down?

A. That is right.

Q. Substantially is it correct that both the logging and the mill, the logging operations and the mill itself were shut down for the winter months?

A. That is true for a certain length of time during the winter.

Q. How months about—December, January February, March and April—four and a half to five months?

A. For the logging department, for the sawmill it would be less time than that; the sawmill had to cut up the logs that were on [32] hand at the end

(Testimony of Frank Momyer.)

of the season, that usually would run anywheres from January to the following March.

Q. In other words, the sawmill would run for maybe—how much longer a year?

A. A month to two months after the logging.

Q. But then there was a lag when it didn't run after the logging operation started, wasn't there?

A. No, they are almost coincidental, just a few days when the logs begin to come to the mill, we start our sawmill and continue then until we saw up all the logs brought in.

Q. And now, with respect to the lumber that went to the box factory, the footages are computed similarly on the basis of the fiscal year, ending March 31, '45, were they not?

A. The lumber that went to the box factory following the fire in the nine month period following the fire—is that what you mean?

Q. I don't know. I will call your attention to the statement—I am referring to on page 2 of the attached exhibit K second paragraph as to lumber sent to the box factory, the footages used have been similarly computed—with reference to the fiscal year ending March, 1945, what does that mean?

A. In computing the overall profits from the operation, we took in both the lumber sold on the market, as lumber, the lumber going through the box factory—I see here it mentions 40,000,000 feet which represent a portion of the production—[33]

(Testimony of Frank Momyer.)

which was sold as lumber, the rest of it would be sold as box shook to the box factory, and retained in the inventory sale—it did not equal production.

Q. I think you also stated in here that in computing the realization, (I am reading from page 2) which would have been produced in the fiscal year ending '46, there have been used, for the loss period, the realizations actually produced in the fiscal year '45, you recall that?

A. I didn't get a clear understanding of the reading.

Q. I think it is only fair you should look at this.

A. That is 1B you are talking about?

Q. Yes.

A. Yes, in computing the realizations or the profits for the fiscal year 3/31/46.

Q. And that was the prior year?

A. We substituted the fiscal year 3/31/45, that was the experiment year we were going to use for the purpose of that claim.

Q. I believe you also said there, about that same point, prices were stable in '46 and were identical with those in the fiscal year of '45?

A. We were still under the ceiling price at that time, and as far as we could see there was no reason to make any substantial adjustment one way or the other in the sale price or any of the costs, because the ceilings were still in effect and labor was also under wage stabilization at that time. [34]

Q. Speaking of labor, is it not a fact that com-

(Testimony of Frank Momyer.)

mencing November 1, 1945, there was a substantial increase in hourly wage?

A. No, there was an increase made November 16, as I remember.

Q. 1945? A. 1945.

Q. And so that amounted to about an 8 to 10 per cent increase in your labor cost over the preceding year, did it not?

A. Yes, but the logging operations were practically completed then because we only log until the end of November, the cost incurred that year would have been the same as before, because up to November 16 they were exactly the same and we were practically through.

Q. Will you show me on that claim you have in your hand, the page that deals with the calculations of the differentials in logging cost, so-called excessive logging cost?

A. On page 22, schedule 4, Roman Numeral III.

Q. What period in computing the increased cost, what period did you use—you used six months up to June 30, 1945, as compared with six months after June 30, 1945?

A. No, we used the three months, preceding July 7, '45, and then we used the period after the fire; logging operations continued up until about October 8, 1945, preceding the wage increase on November 16.

Q. And now, on page 3 of the exhibit attached

(Testimony of Frank Momyer.)

to the document—attached to exhibit K—I will read. [35]

"Lumber converted into shook has been charged at the average costs incurred to the point of diversion, plus box factory processing and disposal cost."

Now, this of course has to do with the box factory operation, doesn't it? A. That is right.

Q. Now, will you explain, please, what is meant by average cost?

A. Average cost might be stated as the actual cost up to the point where the lumber is diverted either to the planing mill, and shipping dock for shipping lumber, or diverted to the box factory for further processing into box shook, where it is loaded and shipped out as box shook.

Q. Well, now, you say actual cost. If we take any fiscal year period such as the fiscal year 1945 that is ending—3/31/45, the books would of course show the actual cost incurred by Pickering Lumber Company in producing the lumber to the point of diversion of the box lumber. In other words, you know how much you spend for logging, you know how much you spend for operating your mill. Then after you got out of the mill, you came to the point of diversion, didn't you?

A. After it was through this drying process, it was rough lumber then.

Q. Now then, you know your actual cost up to that point, don't you? A. I do. [36]

Q. In calculating those costs, you allocate, and

(Testimony of Frank Momyer.)

appropriate portions of your general overhead?

A. No, we do not. Under our accounting procedure we do not attempt to allocate overhead to any department. It would be shown on our statement that we take overhead off in a separate caption under our profit and loss statement—in the one group we do allocate to any department.

Q. Well, but in calculating your cost of operation, in determining what you call average cost at the point of diversion, is it your testimony then that no overhead is taken into consideration?

A. For this claim purpose, here, we did take into account the overhead and at the request of the insurance companies, attempted to allocate some of that to the logging department, and some to the box factory.

Q. You understand my question relates to the statement in this claim that average costs were used, and I ask what was meant by that—so that then I understand your answer correctly, in computing these costs, you take all of the cost incurred up to the point of diversion, including the appropriate portions of the overhead, do you not?

A. Including all of the overhead.

Q. And then you divide that by the number of feet of lumber that you have—in other words, that you have put through this processing, is that correct? [37]

A. That is correct.

Q. And by that means you get an average, what you call an average cost, is that right?

(Testimony of Frank Momyer.)

A. That is correct.

Q. And now, your lumber products sold for varying prices, did they not? A. They did.

Q. What was, for instance—was the highest per thousand feet sale price you had on any character of that lumber you produced at the point of diversion?

Mr. Whittaker: After the fire, Mr. Levit, or what period—would you mind stating?

Q. (By Mr. Levit): Let's take—take the '45 period, for example. Just give us the range of prices that you dealt with.

A. Well, I see some footages were sold as high as $113 per thousand, that was a very small footage, and some of it sold for $30.95, I believe that is the lowest I see here.

Q. Your plant used lumber, was figured at even a lower figure; wasn't it somewhere around $20?

A. Yes, we just use an arbitrary figure on that—it is in and out anyway—we add it on one side and take it out the other, it doesn't make any difference whether it is $40 or $20, you wash it out at the end.

Q. Let's forget the plant use lumber and let's take your price range on the others. It runs then from $100-$113, I think [38] you said, down to around thirty? A. That is right.

Q. And now, you said that was the actual cost—actually what is that, just what is determined, is it not, as average cost. In other words, merely a calculation where you divide your actual cost by the

(Testimony of Frank Momyer.)

number of total feet run through the mill, isn't it?

A. It is in the total money that you spend in bringing in and producing a given footage of lumber.

Q. It is not the total money you spend, Mr. Momyer, the total money you spend—it is merely the amount of your actual cost, it is the total of the money you spend divided by the number of feet in total that you produce, to give an average cost?

A. Per thousand, yes.

Q. So opposed to that figure of average cost, Mr. Momyer, did you ever use of allocated cost on lumber products?

A. Yes, I have heard of allocated cost on lumber products—and on many other products.

Q. Will you explain here how an allocated cost is figured?

A. Well, an allocated cost in the first place is purely a theory as far as I am concerned, and most businessmen do not use it for any purpose other than taxes—materially used for income taxes. The attempt to calculate that same profit, in the case of lumber, for each grade of lumber produced, by allocating it to those various grades of lumber produced, a [39] cost on the basis of the sales price, and in other words, if the lumber sells for $100 a thousand, and the average cost is $5 per thousand, and another grade of lumber sells for $40 per thousand, and some more sells for $70 per thousand, then this theory is the same profit as realized on

(Testimony of Frank Momyer.)

each grade of lumber and therefore you should allocate to these various grades, the cost is proportionate to sales value of the grade and thereby getting the exact same profit from each grade of lumber sold.

Q. Do I understand you to say you consider it more unrealistic to use a cost which attributes the same profit to all the lumber in a different grade than you do to using a cost method which attributes the same cost to all lumber regardless of grade?

Mr. Whittaker: Just a minute, please. I believe the question is not what may be considered as realistic or unrealistic, it involves the province of the Court in dealing with the question of law, and I object to the question.

(Thereupon argument was made to the court by Mr. Levit.)

The Court: I see your point. I am going to overrule the objections. I'd like to have it determined, to find out what the various methods of accounting are.

Q. (By Mr. Levit): Now, it is a fact, is it not, Mr. Momyer, that the question of determination of cost for the product which comes through a joint process is a very difficult one as to which all accountants are not in agreement? [40]

A. Well, I think that that is true; as stated before, I think the real purpose of allocating cost is primarily for tax purposes. I know in our case, we will to keep our board informed, for our own

(Testimony of Frank Momyer.)

information in running our business up there, operate on the basis of the average cost, or the actual cost if you want to call it, because we couldn't tell which lumber is profitable for us to produce, if all of it sells at exactly the same price. Now, there is no difficulty—the reason I think allocated cost is purely fictional, because I can find no basis to think that because one board sells for $100 a thousand and another sells for $35 a thousand, that the hundred dollar board actually costs twice as much to manufacture as the thirty-five dollar board. To demonstrate, starting with the logs in the woods, all grades of lumber are in one package in the form of a tree. For the wood you cut in that tree you pay so much a thousand for the cutting of the tree regardless of how many grades are involved in that tree. You pick that log up and load it on a car and bring it down to the mill, still in one package, you send it through the saw and you get various grades of log from that lumber. But I defy anyone to show that one board in that log costs you more than another board in the log, regardless of what it sells for. It is true that some of it is more valuable to you because it sells for more, but I cannot see there is any basis for it to say that one board actually costs you more dollars to produce than the other one. [41]

Q. In other words, then, if I understand you correctly, the only reason Pickering would have for bothering with cost allocation at all—allocated costs

(Testimony of Frank Momyer.)

we have been calling among the different grades, would be in the computation purpose, is that correct?

A. That is correct. I call your attention that we do on a very limited basis of only nine segregations, and that is done only on the lumber sold as lumber, we make no attempt to make an allocation for the lumber that goes in the box factory.

Q. You wouldn't bother to use allocated basis for lumber going to the box factory?

A. We do not. It may sell as lumber or as box shook as explained by Mr. Whittaker, if we are going to carry it through as allocating a higher cost, going as lumber to the box factory than lumber sold on the market, during the period under question here.

Q. Is it not a fact, Mr. Momyer, that Pickering Lumber Company accountant also showed the box factory operation on the basis of the O.P.A., or value in place, or market price figure?

A. Yes, that is true, that is just for management purposes. In other words, if we are to know whether the box factory is a profitable operation to us, whether we should discontinue it if it is unprofitable, we need to measure the result of that box factory to do that. We take then this price at the box factory door and add on the manufacturing cost, and take the sales price of the shook and find out how much of that is adding on to the [42] profit or loss of that lumber. If that makes a

(Testimony of Frank Momyer.)

greater profit than it would have made had it been sold as lumber, the box factory may be a profitable operation to us.

Under the O.P.A. cost of lumber, we might still lose money. For example, it might be that the value of the lumber at the box factory door was $30, as has been attempted to show here in this appraisal that was made. That means it could have been sold as lumber at that price on the market. Now, maybe we run it through the box factory and we get an additional $5 profit out of that lumber. Therefore the box factory is a profitable operation to us. It adds more to it than we would have gotten if we had sold it as lumber. It might even still produce a loss and be an advantageous operation to us. We lose $10 at the box factory door, and only $5 after processing and selling it as shook, and it has been a profitable operation too, even though it still produces a loss, so far as the actual cost of the lumber is concerned.

Q. Mr. Momyer, in other words, you use the inflated value, or O.P.A. price in your own calculations, and own books in order to determine which operations are making a profit, don't you?

A. We do to that purpose. It goes to our profit and loss statement—that is washed out, it isn't carried in there at all.

Q. Your profit and loss statement so far as the individual department is concerned at the box factory is no concern to [43] Uncle Sam, in connection with income taxes, is it?

(Testimony of Frank Momyer.)

A. Uncle Sam is concerned with what profit you make.

Q. Overall?

A. Not what one department makes.

Q. So that if you do make those calculations for the purpose you say, in order to determine the profit, you are not doing it for accounting reasons but for actual reasons of management, in order to ascertain whether a particular operation is profitable or not, aren't you?

A. That is the purpose of that statement in our schedule.

Q. With reference to your statement that average cost is generally used in costing products in industry, or joint products, I am going to ask you if you agree with this statement that from Raphel & Harris' book on cost accounting and principles and methods, issued in 1948, on page 494 to 97 of taxes. It deals with accounting methods for joint products, and after pointing out there are a number of methods of accounting in joint products, no one of which is said to be the only correct, it says on page 495——

Mr. Whittaker (Interrupting): If your Honor please, I am going to object to the reading from the textbook to the witness and asking him whether he agrees. I think that is not proper—I believe that it is immaterial, it is to argue the law.

The Court: Generally speaking, unless this witness is [44] an expert witness and refers to the text

(Testimony of Frank Momyer.)
himself, it is my understanding that in the rules of evidence they can't be used.

(Thereupon a short argument was given by Mr. Levit.)

The Court: Go ahead.

Q. (By Mr. Levit): On page 495, the statement is made, "When the products are produced jointly, it is not possible to determine the cost of each product with absolute accuracy, the method used is to distribute the joint cost and select approximately the correct result which may be obtained. The possible methods are prorating a joint cost, as according to the relative sales value, market value of the joint product in a given case."

And then the text goes on to quote an example of the application of the market value method followed, and they used the lumber industry as an example of the way of calculating the cost as popularly done by accountants in the lumber industry, and points out that that is how the principle works—as it is already done, you can see that in fact, Mr. Momyer, isn't it a fact that the lumber industry in general, the principle of determining the profit of a particular operation, or particular grade is done on an allocated cost basis, that is the general practice?

Mr. Whittaker: Same objection, your Honor, as heretofore made.

The Court: I will overrule it.

The Witness: I think it is done for management

(Testimony of Frank Momyer.)

purposes, [45] as stated before that most of them at least I believe you will find practically all of them get to their profit and loss statement and wash it out, pay no attention to it. It is a subsidiary statement which tells whether an operation may be profitable to them or not. Allocated cost is used mainly, I stated before and I state again, I believe for income tax purposes. Some accountants a long time ago hit on the idea some possible gain could be obtained for tax papers by using that basis. It doesn't always work that way—sometimes it does.

Q. In other words, if you want to determine your overall profit, you can do it on the basis of average cost, can't you—do it on that basis for your books as a whole, isn't that correct?

A. That is right.

Q. If you want to determine any profit of a particular department, you have to take into consideration an allocated cost based on the market value of the product, do you not?

A. In the case of lumber, it could be sold on the market, under certain market conditions, and there are times when the box factory lumber can hardly be sold at all. In the case where a product could be sold as lumber on the market, and could be sold as box shook—to determine whether you should sell it as lumber or sell it as box shook, you need some information for management to tell you which to sell that lumber.

Q. As a matter of fact—are you familiar with

(Testimony of Frank Momyer.)

the method by which the O.P.A. fixes the ceiling prices on the lumber products? [46]

A. I can't say I am, particularly.

Q. Aren't you aware of the fact that in setting the ceiling price on lumber products, including box lumber, the industry was asked to compile, and did compile and submit to the O.P.A. the costs of products allocated by grade—and that then the question of existing market prices, and reasonable profits, were taken into consideration, and applied to these allocations and that is how the O.P.A. prices were fixed. Don't you know that to be a fact?

A. No.

Mr. Whittaker: I object to the question.

Mr. Levit: He understands the question, don't you? A. I do not.

Q. (By Mr. Levit): Now, at this time we offer in evidence a letter from Robinson & Nowell Company to Mr. Withers, dated August 14, 1946, to which is attached a sheet headed "Use and Occupancy Claim."

The Court: As long as they are looking it over, I think we will take a five minute recess.

(Recess.)

Mr. Levit: I will ask you, Mr. Momyer, if you are familiar with the facts of this letter I now hand you, dated August 14, 1946, to Mr. Withers from the Robinson & Nowell Co. that was sent to them in connection with his claim at that time, sent to the adjusters in connection with the claim? [47]

(Testimony of Frank Momyer.)

A. Yes, I remember that letter—it has been a long time since I have seen it.

Q. And there were some schedules that went with it, were there not? A. I believe so.

Mr. Levit: We will offer the letter in evidence, and asked that it be marked Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit L in evidence.

(Whereupon the letter of August 14, 1946, to Mr. Withers from Robinson & Nowell Company was received in evidence and marked Plaintiff's Exhibit L.)

Mr. Levit: I will read briefly from it, your Honor. In this letter submitted further schedules in connection with the tentative claim, and on page 2, and page 3, there is a reference to the box factory salvage figure here. This statement shows that subsequent to the fire on July 7, 1945, the factory processed 8,000,000 plus feet of lumber into shook, the shook production, all told, was 8,000,000 plus feet, about 200,000 feet under.

Mr. Whittaker: 190,000.

Mr. Levit: The total realization from the shook, including the actual sales realization in the period average annual additions for extra returns and wage savings which are only determined on an annual basis. The gross realization is therefore $60.22 per thousand feet of shook. The cost of the manufacture of shook is determined by subtraction of cost for three [48] months to June 30,

(Testimony of Frank Momyer.)

from the cost for twelve months ending March 31, the difference yielding the true cost for nine months after the shutdown. These costs have all been used in the statement except for vacation payroll used on a twelve months' average depreciation based on the 1944-5 average cost and overhead which has been constructed to be 62 cents per thousand. And thus the total cost of manufacturing and shipping is $13.58 per thousand feet of shook. The difference between the realization of $60.22 per thousand and the cost of $13.58 per thousand is $46.64 per thousand, which may be said to be the conversion value of the lumber, that is, the net return for the lumber used in the factory after deducting the cost of conversion. The lumber used in the factory was 8,828,644 feet, and it has been determined to have a cost of $39.80 per thousand at the factory door. This cost is a composite of 11,814,000 feet produced from the latest operation of the sawmill, and 3,619,000 taken over from the inventory of March 31, 1945; the cost of the former as dry lumber in the yard was $35.67 per thousand, the inventory cost of the latter was $28.94 per thousand, the composite was $34.09 per thousand to which is added dry handling costs and administration and overhead, less credits, amounting to $5.71 per thousand, making $39.80 per thousand. The statement is based on the premise that the profit on the box factory operation is based upon the cost of the lumber used in the factory in an inte-

(Testimony of Frank Momyer.)

grated operation where the entire quantity of [49] lumber available to shook has always been remanufactured at the plant; further, that when cost of lumber has to be found, it is the cost of the most recently manufactured product to the extent of such production and to the next most recent production for the balance, and so forth.

Q. (By Mr. Levit): Mr. Momyer, do you happen to have the report of the Robinson, Nowell & Company for Pickering's operations for the test year, the fiscal year ending March 31, 1945?

A. Yes, I do.

Q. And this report that you have was furnished, of course, to the appraisers, was it not?

A. Yes, I am sure they had it, also the adjusters.

Q. And that report contained the figures for the test year? A. It does.

Q. Will you detach that piece of paper?

A. Well, are you going to take that away from me?

Q. I am going to put it in evidence.

A. I haven't another copy of this to work from.

The Court: You may introduce it in evidence, and then take it back.

Mr. Levit: We offer this report of the auditors in evidence, dated on the cover March 31, 1945, bearing the name of Pickering Lumber Company Corporation, and the name of Robinson & Nowell & Co., certified public accountants.

(Testimony of Frank Momyer.)

The Clerk: Plaintiff's Exhibit M in evidence.

(Whereupon the statement of Pickering Lumber Company dated March 31, 1945, was received in evidence and marked Plaintiff's Exhibit M.)

Q. (By Mr. Levit): And now, calling your attention to page 2 of that report, you will note the statement that the Internal Revenue agent office required that the valuation of the inventory be based on an allocated cost instead of an average cost and accordingly the company filed a recomputation of the inventory based on an allocation cost over the ten principal grades or species, for the year ending March 31, 1942 to 1944, the net result of which March 31, 1944, was decreased in value of $11,000 odd dollars, and for the year ending March 31, 1945, a decrease of $51,000. That is a correct statement, is it not?

A. Yes, I stated heretofore we were required to do that for income tax purposes.

Q. I would like to interpolate, to get one point with respect to the relationship of allocated cost and average cost. If you view the operations of the lumber company such as Pickering from the overall picture, in other words, you don't attempt to break them down by departments, and you calculate profit on the overall operation, your result will be precisely the same, assuming all the lumber is sold at the end of the period, the result will be

(Testimony of Frank Momyer.)

precisely the same whether you figure that on an allocated cost basis, or whether you figure it on an average cost basis. [51]

A. You would use the same dollar, the trouble is it never happens that production and sale are equal.

Q. I understand that. I mean to say that on an overall basis if you take that hypothetical case where you assume that everything is sold, you don't get the complication of that point. You would come out exactly the same with the amount of profit whether you used an allocated cost, or an average cost, wouldn't you?

A. The same dollar would be involved.

Q. Then therefore the only reason, or use of the allocated cost, or price from one department to another is the basis of the market, or in place value, or O.P.A. price, in order to segregate or separate the profit made in the various departments, one from the other, isn't that right?

A. The O.P.A. and allocated price are two different things.

Q. I realize that. Basically an allocated cost is based upon the market price, isn't it?

A. That is right.

Q. And according to the exhibits which were introduced in evidence this morning, plaintiff's exhibits which were the letters you wrote in connection with your stock loss claim, that was exactly what you did in determining the in place value.

(Testimony of Frank Momyer.)

You used the O.P.A., didn't you, on your inventory?

A. Yes, we were trying to determine actual cash value for the fire insurance loss, at that time. [52]

Q. And I suppose that when your accountants in the box factory operation, or in the box factory statement attached in this report which has just been introduced, used O.P.A. or market prices, in place prices, in connection with the calculation for box factory profit, they did that for insurance purposes?

A. They didn't use it for insurance purposes. That is management purposes.

Q. Is it not correct, the only reason you were making use of the O.P.A. prices by your accountants was on account of the fact you had an insurance claim to present?

A. I did not say that.

Q. I misunderstood you, Mr. Momyer. I asked you about the use of the O.P.A. prices in the calculations you made to determine in place value in the inventory figures you furnished to the insurance company, and you said the reason we did that —I understood you to say the reason we did that was because we were making a determination for an insurance claim.

A. That is right. You further asked me also used it on our books and inventory, and my answer was that no, we do not use that at all.

Q. If you will turn to exhibit 6, schedule 6 of

(Testimony of Frank Momyer.)

that report, which is plaintiff's exhibit M—Robinson & Nowell's report for the test year, that deals with the box factory operation, does it not?

A. Page 6? [53]

Q. Page 6, schedule 6.

A. Yes, that is the same calculation we make for management purposes.

Q. So that if you look down that sheet there, you start out in your box factory operation, your auditors start out and take your sale, or realization, don't they, from the sale of the box shook? That is the first division, isn't it?

A. That is right.

Q. And they come out with the net after taking into consideration freight savings, and sale adjustments, and discounts, they come out with a gross realization of $55.31 a thousand, don't they?

A. 55.31.

Q. I am sorry—59.53.

A. That is right.

Q. Then the next calculation is what they call cost and sale, isn't the purpose of this schedule to arrive at profit of the box factory, isn't it?

A. No, it is to give the management a picture of what the box factory is doing; if you want to get a true picture of the income tax, look on page 6 of the statement. This is for management information the same as the monthly statement shows.

Q. What is that purpose—you are going to come out after you make these calculations, you are go-

(Testimony of Frank Momyer.)

ing to come out with a profit or loss. That is the only purpose of making the calculations, [54] isn't it?

A. To show the management this operation was worthwhile, and should not be discontinued, or expanded and continued further.

Q. In order to know that, you have to know what profit you made on it, don't you?

A. How much more it is making for you than it would have made if you had sold it as lumber before it went through there.

Q. You take then the cost of the sale, and I read you items under cost and sale—I would like very much for your Honor to examine this document at the same time. We are just talking about the sale coming out with the realization of 59.53 per thousand in this preceding year—the last column is the cost of sale. Now, that first line reads: "Lumber to the factory, value in place 16,000,000 plus feet at a price of $29.17," right ? And then some minor adjustments are made, a minor adjustment was made, and you come out with a price of $29.99, then you would deduct another minor adjustment and come out with the figure of $28.44. Now, you show then the net cost of the lumber to factory, value in place that lumber went through the box factory at a figure of $28.44.

Now, let me ask you, Mr. Momyer, where that figure came from. How was that figure arrived at, or any of the figures that I have just mentioned

(Testimony of Frank Momyer.)

preceding the $29.17, or $29.99? Isn't it a fact those are the O.P.A. or market values, or in place value price, just as it shows on the inventory we introduced [55] this morning?

Mr. Whittaker: What do you mean? You asked about four questions in one. I have been sitting calmly by, because the witness is well able to take care of himself. I think it is unfair to ask him those kind of questions.

The Court: As I remember, the question asked whether this $29.00 was based on O.P.A.

Mr. Whittaker: That will suit me.

The Witness: It is so based.

Q. (By Mr. Levit): It is so based?

A. It is so based.

Q. And then, Mr. Momyer, next are taken out under the cost of sale, the cost of manufacture, which we run through here, and then depreciation, and then sale waste, and then you finally come out with the total cost of manufacture, and then you take your change in inventory and finally get a figure of the total cost of the sale, is that correct?

A. That is right.

Q. Then you take off your shipping expenses, rather add your shipping exenses and get the total cost of the sale. Then you get—you go back up to the top of the second—and take your sale realization, and by the process of subtraction, you arrive at a figure of the net gain over market value of lumber, of $20.89 by the operation of the box factory. Is that correct?

(Testimony of Frank Momyer.)

A. That is right. No mention is made to the profit—net gain [56] over it.

The Court: What does that mean?

A. That is the gain over what you could have sold that same lumber on the market—in other words, that is showing you——

Q. (By Mr. Levit, interrupting): You make that calculation, as you said, for the purpose of determining whether or not it is worthwhile operating the box factory?

A. That is correct. The true income statement is on page 6.

Q. Now, as you said for your own purpose you kept your books on the basis of an overall realization, and used average cost in making up your final statement, didn't you?

A. That is correct, as far as our books are concerned. I might add we still have to make this adjustment for income tax purposes on an allocated cost basis, on only nine segregations. If you are going to total the true allocated cost theory, there are a hundred different grades or more, that all sell at different prices and to produce a true allocated cost it would be necessary to use all of those ceiling prices and attribute the cost to each one of them. It is obvious then that this is just a very modified form of an allocated cost done for tax purposes only.

Q. Isn't it a fact, Mr. Momyer, that the extent to which you break down the grades in determin-

(Testimony of Frank Momyer.)

ing an allocated cost basis, is purely a matter of convenience and a matter of managing—management judgment? [57]

A. I would say if you are going to follow an allocated cost theory, you would have to take each and every grade that sells at a different price. That is the theory.

Q. You might even take every piece that sold at a different price, for that matter, wouldn't you? A. You certainly would.

Q. And that is your understanding of the way —proper accounting method of determining allocated costs, take every grade—a hundred of them if necessary—and any slight difference in price in order to determine any kind of a proper accounting?

Mr. Whittaker: I object to the question as argumentative.

The Court: I think so.

Q. (By Mr. Levit): Now, I will call your attention to page 11 of this statement, and to the figures about a third of the way down the page which show the profit on lumber sales, you sold as lumber out of the factory in the year, the test year, and your average profit, your profit per thousand, I should say, for lumber sale was $3.65 per thousand, was it not?

The Court: That was sold out of the factory?

Mr. Levit: Sold out of the mill.

A. Referring to another supplemental schedule,

(Testimony of Frank Momyer.)

it still isn't the income tax statement yet—a supplemental schedule made on lumber sales alone.

Mr. Whittaker: What?

The Witness: Lumber sales alone, not including the [58] box factory.

Q. (By Mr. Levit): That is a correct figure, is it not?

A. $3.65 is the correct figure there.

Q. Now, further down on this schedule, page 11, is an item—profit on lumber to the factory of $14.55. Now, that figure is based on the average cost. In other words, that is what you are telling to the Court when you stated that in carrying the box factory detail—we just look at the back of your book for the accounting purposes, you used the average cost rather than the market value, or value in place, don't you?

A. That is the same figure that appeared in schedule 6, referred on page 16, you were talking about a moment ago.

Q. Only appears in schedule 6, because had you reversed—the accountants reversed the operation we just went over in such detail, after arriving at a profit or gain over the market value of lumber, they then reversed that calculation so far as the value of the lumber is concerned, as you testified you then used market value—I mean average cost of the lumber, you come out with a profit—you carry your books, basis of an average cost of $14.55, isn't that right ?

(Testimony of Frank Momyer.)

A. That has not here been done. That is down on page 10, on the preceding page all in the subsidiary schedules.

Q. Regardless of where it is done, that is what happened?

A. This is still on the basis—$14.55 is the basis of profit, on the basis of the lumber going into the box factory as though [59] it were sold—we calculated that $14.55 on that basis. It is the same figure we are talking about on page 16.

Q. Let's be sure we do understand each other. Schedule 6 is a statement of the box factory operations for the test year in an attempt to arrive at the profit, is it not?

A. That is right.

Q. Arrive at the net gain over market value of lumber, of $20.89, doesn't it?

A. That is right.

Q. Then it starts over again and it takes the lumber to the factory at value, and then on the factory as shown before, the realization of the lumber—you get the realization for the lumber, then deduct from the realization the cost of the lumber at the factory to $37.39 is your average cost, isn't it? A. That is right.

Q. And then you come out with that $14.55 figure, the one I called your attention to in schedule 1? A. That is right.

Q. And that figure is arrived at by using not the value—the place or market value, or O.P.A.,

(Testimony of Frank Momyer.)

but arrived at by using average cost?

A. $37.39 average cost.

Mr. Whittaker: What is that figure?

Mr. Levit: 37.39.

Mr. Whittaker: May I ask, is that the average cost to the [60] diversion point?

A. That is right.

Q. (By Mr. Levit): And then on page 4, and I read briefly.

(Mr. Levit reads a portion of the report.)

Now, on page 17 the total cost of the lumber sold and used before manufacture, the total cost is shown as $22.00 a thousand and the cost of the manufacture at $9.26, and the total is $31.62, then adjusted for inventory, and handling to the figure of $37.39, and that is the figure, is it not, Mr. Momyer, that you have used in the proof of loss, as the so-called average cost to the point of diversion. Is that right?

A. That is true. The $31.52 before overhead expenses are added. You will note that overhead expenses on the next page, to come out to the total of $37.39.

Q. Part of the same schedule on page 22?

A. The 31.52 is not the complete figure.

Q. On page 22, the inventory—headed inventory, is the trial, basis of the first tabulation for the fiscal year ending 1944, and the second portion would be the tabulation for the fiscal year ending March, 1945, the test year. Now, calling your attention,

(Testimony of Frank Momyer.)

Mr. Momyer, to the column in about the middle of the page headed Current Year Per Thousand 1945, March 31, 1945, those figures in that column are as stated at the top of the column allocated cost, are they not?

A. Yes, for the income tax purpose—stated nine segregations [61] taken for this purpose.

Q. And those allocated costs are calculated, of course, on the basis of the O.P.A. market price, aren't they?

A. On lumber sold only. It had nothing to do with the lumber going through the box department.

Q. You mean your inventory on footage does not include the lumber that went through the box factory? A. This calculation does not.

Q. I call your attention to the fact all ten grades are included there.

A. Ten grades sold as lumber, yes.

Q. You did sell some box lumber, did you?

A. No, that wouldn't necessarily follow—there might have been some sale of lumber——

Q. (Interrupting): Let's not go too far afield here. Look at this schedule 10 on page 22, and you will find listed in your inventory there in excess of 4 and a half million feet of box lumber, under mixed pine. I thought you said you didn't sell any of that lumber?

A. That is an end of the year inventory, it doesn't mean we sell it—it is an inventory figure.

(Testimony of Frank Momyer.)

Q. Just tell whether that was included or not, whether that was lumber that was sold—whether box factory lumber wasn't included?

A. I said the purpose of this schedule was to carry out the request of the Income Tax Department, we applied it to our lumber [62] sales—allocated cost in order to calculate it—that is what we have done.

Q. I understand that, but what I asked you was this: is there anything in the last column which shows that the allocated cost for the current year per thousand are—an allocated cost figure based upon the O.P.A. ceiling price, is that not correct?

A. That is correct.

Q. Is it not true, you said a moment ago that those prices were not used with respect to lumber going to the box factory, that was true of all the lumber that you had in your inventory going to the box factory or not, wasn't it?

A. It was not applied on any lumber that went to the box factory, because we didn't sell that.

Q. What became of the four and a half million feet listed in this inventory under mixed pine under the heading "Boxes" 4,592,—some-odd hundred of feet; didn't that lumber go to the box factory?

A. I think it did, yes, sir.

Q. Isn't it a fact the figure $21.51 for allocated cost must have been determined on the basis of OPA ceiling prices?

A. I don't see the $21.51.

(Testimony of Frank Momyer.)

Q. Follow that line right on out; you will see it in the middle column of the page.

A. I thought you were talking about this 44 year.

Q. I am talking about the test year, the year 1945, ending [63] March 31st, 1945.

A. That is all right, as far as the inventory evaluation is concerned. We still don't calculate a profit or loss on it, we don't sell it——

Q. (Interrupting): It is a fact, isn't it, that you used the OPA ceiling price because of the ruling of the Income Tax people in determining an allocated cost on inventory, is that correct?

A. We didn't use it to determine allocated cost on inventory.

Q. It is also correct that you used the OPA price in determining the gain made in the box factory for management purposes if you will,—for that purpose had nothing to do with the income tax ruling in connection with the setting up the operations of your box factory, isn't it?

A. That is right, we used it for management purposes, not for income, or to profit and loss.

Q. Now, it is a fact, isn't it, Mr. Momyer, that the calculations were necessary to be made in order to determine the amount that should be paid by the insurance company under these used and occupancy policies—were quite complicated?

Mr. Whittaker: If the Court please, I think

(Testimony of Frank Momyer.)

that is calling for the conclusion of the witness.

The Court: I will let him answer the question. I think it is complicated myself.

A. They are complicated, but there was another way of presenting [64] the claim that would not be complicated.

Mr. Levit: I didn't ask you that, Mr. Momyer, I asked you if they were complicated.

(Thereupon an argument was presented to the Court by Mr. Levit.)

Q. (By Mr. Levit): Now, Mr. Momyer, it is your statment, then, that no question of accounting judgment were involved in determining the proper amount to be paid under these policies, but that matter—was just a matter of going to the books and getting the answer?

Mr. Whittaker: If the Court please, I will object to that question on the ground it is calling for the conclusion of the witness, and it is argumentative.

(Thereupon a short argument was delivered to the Court by Mr. Levit.)

Q. (By Mr. Levit): I will now show you, or perhaps offer in evidence with that identification the reply affidavit of Pickering Lumber Company which has already been referred to.

The Court: What is that exhibit number?

The Clerk: Plaintiff's Exhibit N in evidence.

(Testimony of Frank Momyer.)

Mr. Levit: I think that is already in—what is the number of that?

The Clerk: Plaintiff's Exhibit E.

Mr. Levit: I will withdraw that offer. Now, Your Honor, I would like to read certain portions of that document at this [65] time, on page 3, subparagraph c. I should say this is a reply affidavit filed with the insurance company in connection with this claim, and signed by Mr. Momyer and Mr. Johnston.

"The policies of insurance designated and described in the final proof of loss do not physical articles or properties, but, on the contrary, cover an intangible item, namely, the loss caused by interruption of business of the insured due to the destruction of its physical properties by fire. Since the business of the insured could not be operated because of the destruction of its physical properties, the insured can only estimate what its profits and expenses would have been had it operated during the period following the fire when, in fact, it could not operate because its properties had been destroyed by fire. It is therefore compelled by the terms of the policy to estimate what its profits, expenses and fixed charges would have been had it operated the business during the period when the business was not operated."

Mr. Levit: And on page 4 there is again a reference to the period following the fire and I quote: